Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 39 ST. LOUIS, MO., AUGUST 31, 1894. No. 9

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The Supreme Court of Michigan, in a recent opinion, found it necessary to administer a scathing rebuke to an attorney in the cause, whose misguided zeal in behalf of his client imprudently led him to attack the judge who presided at the trial in the following unseemly language: "It is impossible to read this charge without being impressed with the idea that the trial judge made a much stronger defense for the railroad than its regular counsel, and that such judge was gunning for game on his own account. * * * It bears upon its own face its utter dishonesty. I make no pretense of respect for the charge or the judge that delivered it. It means nothing else than that the trial court deliberately and purposely, with preconceived intention, defeated the plaintiff, so far as within him lay. It cannot be excused as inadvertent or even carelessness. It is simply malicious; a wanton prostitution of the most sacred element of its office." The Supreme Court, after a denunciation of this language, concludes by saying that "such attacks in court records upon honorable members of the profession are without the pale of professional ethics, and as such we feel that we owe it to the judiciary and the profession to set the seal of our disapproval upon it." It should be a matter of gratification to the profession that while it often occurs that members of the bar differ widely from the rulings of the trial court, seldom indeed does an officer of the court so far forget the respect and reverence due to it as to make a personal attack upon its representative.

The *University Law Review* calls attention to the extension of life insurance to horses, as illustrated by the recent decision of Tripp v. The Northwestern Live Stock Ins. Co., 59 N. W. Rep. 1. It appeared in that case that the company had insured the life of a valuable stallion of plaintiff's for one year. Toward the close of the year the horse was sick, and a veterinary sent by the company advised that he was worthless and should be killed as an act of mercy. On the last day of the life of the policy the president told the owner he had better follow the veterinary's advice. The beast was accordingly shot, two hours before the expiration of the policy. Whereupon the owner brought this action. Of course, he could not recover simply on the policy, for it only covered death "by disease or accident," and the death in question was caused by intent to prevent death by disease. The complaint pleaded the direction of the officers of the company. The ruling was that they had no power to bind the company by such directions, for its business was to insure, not to destroy and then pay for destruction.

The injunctions issued by the courts against the members of labor unions are getting to be more sweeping in character. A judge of the Superior Court of New York recently enjoined the members of the Journeymen Tailors' Union on strike against a reduction of wages from assembling or loitering near their employers' places of business, from maintaining "a system of patrol, picketing, or espionage," and from all other acts tending to hinder their employers from carrying on businss. The order goes even further, and specifically restrains the defendants from interfering by means of published circulars or notices, or by signs or menaces of any kind, intended to prevent workmen from seeking employment from the plaintiffs. It also prohibits "enticing" any one from the employment of the plaintiffs. The terms of this order are broader than those of the restraining orders recently issued by the United States courts in the West. It is doubtful if they are not too broad. It is one thing to threaten a man with violence if he goes to work, and quite another to entice him away from it. Recent English decisions have drawn the line very sharply between what may and what may not be done by laborers on strike, and we believe that they are to the effect that neither "enticing" nor "picketing" is unlawful. It may not be desirable to follow these decisions, especially in regard to picketing, but they are deserving of consideration.

NOTES OF RECENT DECISIONS.

MUNICIPAL CORPORATION — ASSESSMENT—SANITARY REGULATIONS.—The Supreme Court of Indiana decide in Walker v. Jameson that an ordinance providing that garbage shall be collected only by the city's licensed agent, and that the parties producing garbage shall place it in boxes for removal by such agent at their expense, and a contract empowering the contractor to collect such garbage and to charge a specified price per pound, do not constitute an "assessment," and are valid. Such ordinance and contract are a valid sanitary regulation, and cannot be considered a confiscation of property. Dailey, J., says, *inter alia:*

It cannot be said that the charter does not expressly authorize the fixing of prices for removal of garbage, because the same section which confers upon the board the power "to remove all dead animals, garbage, filth, ashes, dirt, rubbish or other offal from such city, either by contract or otherwise," impliedly authorizes the fixing of a price therefor. That is the very essence of the power to contract. The appellant's learned counsel say: "But the charter never gave the board of public works power to contract for removal of garbage on behalf of any one, except on behalf of the municipal corporation. Had it undertaken to confer upon them the power to fix prices which should be paid by citizens for its removal, then it would have said so in express terms, just as it did with reference to water, gas, etc. The fact that it did not do so is evidence . . . that it contemplated or conferred no such power." It is within the general power of a government to preserve and promote the public welfare, even at the expense of private rights. 18 Am. & Eng. Enc. Law, 739, 740. Police power is defined in Gas-light Co. v. Hart, 40 La. Ann. 474, 4 South. Rep. 215, where it is said: "It is the right of the State functionaries to prescribe regulations for the good order, peace, protection, comfort, and convenience of the community, which do not encroach on the like power vested in congress by the federal constitution." In Com. v. Alger, 7 Cush. 53, the court lays down the rule that "rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." In Thorpe v. Rail. road Co., 27 Vt. 149, it is said: "By this general police power of the State, persons and property are subjected to all kinds of restraints and diligence in order to secure general comfort, health, and prosperity of the State." In Lake View v. Rose Hill Cemetery Co., 70 Ill. 192, the court say: "The police power of the State is co-extensive with self-protection, and is applicably termed the 'law of overruling necessity.' It is the inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort and welfare of society." Hale v. Lawrence, 21 N. J. Law, 714; Tied. Lim. § 1. It is said in 18 Am. & Eng. Enc. Law, 744, 745, that a law which might be invalid as an exercise of the right to tax for revenue might be sustainable where its purpose was the promotion of the general public health or morals. In exercising the power of taxation, no discriminations are to be made, while in the exercise of police power, the State is ordinarily to be governed only by considerations of what is for the public welfare. It rests solely within legislative discretion, inside the limits fixed by the constitution, to determine when public safety or welfare requires its exercise. This must be determined by recognized principles. "Courts are authorized to interfere and declare a statute unconstitutional only when it conflicts with the constitution. With the wisdom, policy, or necessity of such an enactment they have nothing to do." *Id.* 746.

It resolves itself solely into a question of power, and not of mere reasonableness. We recognize the rule that a municipal corporation has no power to treat a thing as a nuisance which cannot be one; but it is equally well settled that it has the power to treat as a nuisance a thing that, from its character, location, and surroundings, may or does become such. In doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question. Baumgartner v. Hasty, 100 Ind. 577-578. In 15 Am. & Eng. Enc. Law, 1173, it is said: "Municipal corporations are usually given authority to pass ordinances providing for the preservation of public health. This is one of the police powers of the State, and there can be no doubt that the sovereignty has the right to delegate this power to municipal authorities." In Beach on Public Corporations (volume 2, § 995) it is said: "A by-law of a city prohibiting any person not duly licensed by its authorities from removing the house dirt and offal from the city is not in restraint of trade, but reasonable and valid, on the ground that, in the interest of public health, a city is justified in providing for some general system for removing offensive substances from the streets by persons engaged by the city, and responsible for the work, at such times as they are directed to attend to it." So, Dillion on Municipal Corporations (section 369) is as follows: "Our municipal corporations are usually invested with power to preserve the health and safety of the inhabitants. This is, indeed, one of the purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain. It will be useful to illustrate the subject by reference to some of the adjudged cases. An ordinance of a city prohibiting, under a penalty, any person not duly licensed therefor, by the city authorities from removing or carrying through any of the streets of the city any house dirt, refuse, offal, or filth, is not improperly in restraint of trade, and is reasonable and valid. Such a by-law is not in the nature of a monopoly, but is founded on a wise regard for the public health. It was conceded that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons, but practically it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at hand, and able, from habit, to do the work in the best way and at the proper time." It has often been held to be reasonable to grant to one or more the exclusive right to remove the carcasses of dead ani-

mals and other offal of a city. *In re* Vandine, 6 Pick. 187; Cooley Const. Lim. (6th Ed.) p. 739; Tied. Lim, p. 316; Dill. Mun. Corp. §§ 141, 142. In the case of Boehm v. Mayor, etc. (1883) 61 Md. 259, it was held that the city, under the power to preserve the health and safety of its inhabitants, had the undoubted right to pass ordinances creating boards of health, appointing health commissioners with other subordinate officers, regulating the removal of house dirt, night soil, refuse, offal, and filth by persons licensed to perform such work, and providing for the prohibition, abatement. and suppression of whatever was intrinsically and inevitably a nuisance. The case of *In re* Vandine, 6 Pick. 187, is in point here. It directly adjudges that a by-law of the city of Boston prohibiting any one not licensed by the city from removing house dirt and offal from the city is valid. On the trial the court instructed the jury that the subject of regulation was one on which it was proper for the city to legislate, it having reference to the public convenience and the health of the inhabitants; · · · that it was the duty of the city to remove from the streets and houses all nuisances which might generate disease or be prejudicial to the comfort of the inhabitants, and it was both reasonable and proper that it should be in their discretion to contract with persons to perform the work, so that it might be done on a general system. If it were found, on experiment, that the duty would not be thoroughly and faithfully performed, or would be attended with more expense to the city, if individuals should remove these substances in their own carts and upon their own account, it was competent for the city government to enact a by-law which should subject all such persons to the vigilance of that government, and which should require them to be first licensed. The jury were further instructed that so far as, by virtue of the general laws of the commonwealth, the city council had power to make by-laws for governing the city, these regulations were binding on all persons actually resident within its limits, either for business or pleasure, and whether inhabitants or strangers; that the object of the by-law being to secure to the city the regular and effectual removal, by public authority, of all sources of nuisance which are collected and accumulated in the houses in the city, by not suffering individuals under no obligation of trust to interfere in the same, it amounted to the prohibition of a nuisance, and that, so far as it affected trade, it was not a restraint, but only a regulation, of it. The defendant excepted to these instructions, and, on appeal, urged chiefly that the by-law was void, being in restraint of trade; also, that it created a monopoly, and that the city had no right to say it should be removed only by a person having a license. In ruling upon this question, the court upheld the instructions of the trial court, and said: "The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expenses which are deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times, and in such manner, as would best accommodate them. Every one will see that, if this business were thus managed, there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight, and poisoning the air with their effluvia. · · · It seems to us · · · that the city authority has judged well in this matter. They prefer to employ men over whom they have entire control by night and by day, whose services may be always had, and who will be able, from habit, to do this work in the best possible way and time. Practically, we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements nor annoy the inhabitants. We are satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city."

In view of the great weight of authorities, we are of the opinion that the contract and ordinance assailed are both within the long-settled and clearly-recognized lines of police power, which is as broad as the power of taxation, and, being simply a sanitary regulation, they cannot be considered as in the nature of confiscation or an attempt to create a monopoly.

NEGLIGENCE — DANGEROUS PREMISES — TRESPASSERS. — The Supreme Court of Louisiana say in Fredericks v. Illinois Cent. R. Co., that the possessor of lands or tenements is not at liberty to plant in them dangerous instruments which may seriously injure trespassers; but he is under no duty to keep his premises in a safe condition for other persons than those whom he invites, and consequently he is not liable to trespassers for injuries they may receive for defects not amounting to traps in such premises, and that if a person allows a dangerous place to exist on premises occupied by him he will be responsible for injury caused thereby to any other person entering the premises by invitation or procurement, express or implied. The court says:

The question at the threshold is whether this statement makes out a case of negligence on the part of the defendant. The counsel for the defendant puts the question thus: "The only point of alleged negligence against the defendant is that the spaces between these broad cross-ties ought to have been filed in so as to make a passageway over the gutter where none was intended by law, and where people, as a rule, had no business or right to cross. There are street crossings on every street, at the crossings. The gutter in the middle of the street is not a normal place to cross, and it is not expected that anybody will cross there." Again: "There was no such passageway over this gutter, at this point, before this structure was erected. It was not intended that there ever should be any passageway at this point. Our structure was not intended as a passageway for foot passengers, and they had no right to cross the street at this point, where it was not contemplated that foot passengers should cross. We were therefore under no legal obligation to provide a safe passageway over a place where the law provided none. . . . If the defendant in this case is guilty of any negligence, then every person who lays a twelve-inch plank across a gutter in the middle of a street in the city of New Orleans, for his own convenience, with the consent of of the city, is liable for negligence to any person who

undertakes to walk that twelve-inch plank, and, missing his footing, falls in." The culvert in question was a ditch or drain which had been constructed by the city, and had been in use by the city long prior to the time of the construction of the trestle or culvert in question. That ditch or drain is just such as exists in all parts of the city for like purposes. The switch-track turned out from Louisiana avenue in a curve, crossing this ditch in the direction of the defendant's private grounds. The place of the intersection of this track with the gutter was neither in the street nor in the crossing or footpath on the side of the street. The track was between the two, and impeded the using of neither in any manner. To all appearance, the street was left just as free for the use of vehicles, and the sidewalk and crossing of the gutter just as free for the use of pedestrains, as before the defendant's culvert was constructed over this gutter. Consequently, there is no casual connection between the two; the structure complained of not being in the street, or sidewalk adjacent to the street. On the contrary, the evidence shows, that the fact is, that there was a good crossing over the gutter, within a few feet of the switch-track crossing; and it was the legal and commonly used footpath for all pedestrians, and the switch-track did not lie in the customary path of pedestrians going across Louisiana avenue. Wherefore, this structure could not have been built "in wanton disregard of the equal rights of every inhabitant thereon to the enjoyment of the street," as plaintiff alleges it was.

The case cited by the plaintiff from Hawkins' Pleas of the Crown (page 404) was that of digging a ditch in a highway, making a hedge over it, or laying logs of timber in it. The case cited from Wood on Nuisances (section 266) is that of an unauthorized excavation in or near a highway. Barns v. Ward, 19 L. J. C. P. 195. The case cited from Rorer on Railroads (page 546) is that of leaving impassable obstructions or an open culvert in a public road. Judson v. Railroad Co., 29 Conn. 434. The case cited from 5 Dill. 96, and Fed. Cas. No. 9,302 (Morgan v. Bridge Co.), is that of a railroad company making an excavation in a street, and leaving it unguarded. The case from Pierce on Railroads (page 248) is that of a railroad company causing defects or leaving obstructions in a highway. Gillett v. Railroad Corp., 8 Allen, 560. The case stated in Wasmer v. Railroad Co., 80 N. Y. 212, is one of the company failing to place planking or filling on the side of the rails at a crossing. Gray v. Railroad Co., 65 N. Y. 561. The case of City of Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. Rep. 155, was that of the city making an excavation in a street, at a place where it knew children living in the vicinity were accustomed to play, and where they had a right to be, at all proper times, without being intruders on the premises. In our opinion, neither of these cases meets the requirements of this case, because of the fact that the structure of the defendant was not built in the street or sidewalk, and was constructed in a good, substantial manner. There was nothing in the structure, within itself, to tempt children to it, or to induce them to use it. In putting a crossing over the gutter for its use and convenience, the defendant did no more than the citizens residing in the community did for their convenience and utility. There are, doubtless, similar gutters in all parts of the city; and if every one who puts a bridge or walk over one of them for the use or convenience becomes liable for the happening of any accident or injury that may occur to any chance pedestrian who may use it at any time, a strange condition of things would, in all likelihood, take place. But the defendant did not act capriciously. It placed this culvert where it did from sheer necessity of its situation; and, in constructing the switch-track as it did, it apparently did the best thing for the community, in not putting the same in either the street or sidewalk, and thus avoided trespassing on the rights of any one, or disregarding the equal rights of every inhabitant of the city to the undisturbed enjoyment of the street and banquette, as well as of the crossing. In thus constructing this switch-track crossing, the defendant did not put it "in a place frequented by children of all ages, and used by them as a playground," because their playground was in a square of ground near by. This switch-track was not built "in their [the children's] customary path across the street," because the evidence shows, and the proof is, that the customary path of children, as well as of adults, was over the crossing near by,—a covered and safe crossing of the gutter established by the city. Indeed the proof does not show that the children of the neighborhood, who were accustomed to assemble on the adjacent square for purposes of play, had ever been accustomed to use this switch-track crossing at all. On the contrary, we gather from the evidence that this crossing was rarely used in this way, and the incident under consideration was exceptional. Evidently, this is not such a case as that plaintiff's counsel cite from Judson v. Railroad Co., 29 Conn. 434, as will appear from the following extract from their brief: "A railroad company constructed its road across the main street of a village, about a foot and a half above the level of the street. The street was twelve rods wide, with two traveled paths on each side of the street, and an open common between them. The company was required by its charter to restore any highway intersected, so as not to impair its usefulness. The company put the two traveled tracks in proper condition for passing with vehicles, but made no other crossing. About midway between the two paths, they constructed a culvert under the timbers of the track to let the water accumulating from rains pass through, which was left uncovered. A person walking across the street upon the railroad track at a time when the culvert was filled with snow, and could not be seen, feel into it, and was injured. Held, that the railroad company was liable for the injury." In their opinion the court ask: "Why should not the defendants place the whole of the highway, as well as part of it, in such a condition that it could be safely and conveniently used by the people? Why leave in it, anywhere, uncovered ditches and culverts, so far rendering it unsafe for foot people to pass along or across it?" As will appear from the facts recited *supra* this is a very different case. The case of McCloughry v. Finney, 37 La. Ann. 27, cited in plaintiff's brief, is one of an accident happening to a small boy passing along the banquette in front of a feed store on Poydras street, in the city of New Orleans, from a sack of corn which fell from the top of a pile of corn that had been placed on the banquette by the defendant. The case of Railroad Co. v. Stout, 17 Wall. 657, is one involving the condition and management of its turntable, constituting it a dangerous machine. In O'Connor v. Railroad Co., 44 La. Ann. 339, 10 South. Rep. 678, we held, upon the examination and citation of a great many decisions and opinions of text-writers, that the possessor of lands or tenements is not at liberty to plant in them dangerous instruments, which may seriously injure trespassers, but he is under no duty to keep his premises in a safe condition for others than those whom he invites, and therefore he is not

liable to trespassers for injuries they may receive from defects not amounting to traps in such premises. That was a case of a little child who had resorted, in company with other children, to the yards and premises of the defendant, for purposes of play, and was injured by a coal dump, of peculiar construction, which was left standing on its track. After quoting with approval from a decision of the Massachusetts court (Coombs v. Cordage Co., 102 Mass. 572), to the effect that, "if a person allows a dangerous place to exist in premises occupied by him, he will be responsible for any injury caused thereby to any other person entering the premises by his invitation or procurement, express or implied," we made this inquiry in the O'Connor case: "With reference to children of tender years, it may be conceded that they proceeded with due care; but can it be said that the condition of defendant's fence operated as an invitation or procurement, express or implied?" In that case a verdict in favor of plaintiff was reversed. The instant case is easily distinguished from the case of Westerfield v. Levis, 43 La. Ann. 67, 9 South. Rep. 52, as in that the negligence of the defendants was fully established; they having left a heavy iron roller, with two mules attached thereto, unattended by a driver, on an open public street; the mules not fastened, and the wheels of the roller unlocked.

THE DOCTRINE OF ESTOPPEL AS APPLIED TO MARRIED WOMAN.

Estoppel was an old and well established doctrine at common law, and had obtained no small development in the time of Coke. (See Co. Lit. 352 a.) But the courts of law applied the doctrine in a characteristic manner, which made it in their hands deservedly odious. Courts of equity recognized the principle as an equitable one, and partly following the law and partly by analogy to it, created the doctrine of equitable estoppel.[1] This doctrine has become of great importance in modern times; though its development and infusion into the law seems to have been so gradual and unconscious that text writers, by failing in many cases to note the differences of origin and growth,[2] and by confusing parts of it with other subjects, have left the whole doctrine of estoppel, it is scarcely too much to say, in a more disordered and unscientific condition, than any other subject in the law.

§ 1. *Disability of Coverture.*—At common law the personal existence of a married woman for most purposes was merged in that of her husband. Husband and wife were one person, and that was the husband. That her *status* has been almost completely changed by modern legislation has intensified rather than lessened the importance of the doctrine in question. It was not until after the disabilities of coverture had been largely removed, that courts began to bring out the principles involved and their logical effect in all directions. The questions at issue in the cases arose only after the *feme covert* disabilities began to be removed piece by piece, so that the matter is of quite recent importance.[3] In spite of all modern legislation, or rather because of it, a married woman still occupies a somewhat anomalous position in the law. The extension of her legal capacity has given rise to many curious questions as to her precise legal *status* under given circumstances—though it will be found that the nature and limitations of the coverture disabilities are now pretty accurately defined, and that the late cases, most of them in States where but a shadow of the common law disabilities remains, put the whole matter on a tolerably clear basis.

§ 2. *The Doctrine of Estoppel.*—An estoppel is defined to be "a preclusion in law which prevents a man from alleging or denying a fact in consequence of his own previous act, allegation or denial of a contrary tenor."[4] It is usual to divide estoppel into three kinds, after Coke, who classified them as estoppel by deed, by record and by matter *in pais*,[5] for there is also an equitable as well as a legal estoppel by deed. Considered on principle, there is a slight incongruity in the subject as ordinarily limited. Estoppel by record, as record, is a typical common law doctrine. It is absolute and unyielding, and however well founded in policy, it undoubtedly had its origin, not in considerations of policy, but in the exaggerated respect of the early law for parchment and seal. The doctrine of *res judicata*, which is usually treated as a branch of estoppel by record, is really not a branch of estoppel at all but goes on the principle of *interest rei publicæ ut sit finis litium*. How then can this so-called estoppel be said to arise out of the act of the

[1] As showing its recent development, see for example the meagre treatment of a few of the details in Fonblanque's Equity. The doctrine itself is not mentioned.

[2] Bigelow, it is true, points out this distinction in origin and growth by dividing estoppel into the old, middle and new periods; but in his actual treatment of the subject, especially in his earlier editions, he largely loses sight of it.

[3] *Cf.* Treatment of estoppel of married women in the first edition of Bigelow on Estoppel with that in the fifth.

[4] Stephen on Pleading, 239.

[5] Co. Lit. 352 A.

party?[6] Equitable estoppel, too, it will be seen, is based on a different principle. The importance of these distinctions will soon appear.

§ 3. *Estoppel by Record.* — As just remarked, two rules are usually treated under this head. Records merely as records are conclusive upon all persons; but as *res judicata*, or as an adjudication of a cause, or material fact in controversy, the record is conclusive only upon the parties to the suit and those claiming under them.[7] No one, whatever his capacity or incapacity, can dispute the entries in the record. "They import in themselves such incontrolable credit and verity as to admit no plea or proof to the contrary.[8]

§ 4. *Judgments Against Married Women as Estoppels.*—When the record is considered in its character of an adjudication a different rule prevails. No one is estopped by a judgment unless it was pronounced by a court having jurisdiction, and it is in all respects a valid judgment. In the case of a married woman, the question arises when and how far a court can bind her by its judgment. As a married woman cannot make a valid contract at common law, it has been said that she is not concluded by a judgment, as it is the highest species of contract or is in the nature of contract.[9] In the case just cited, it was not necessary to hold the judgment void to reach the decision made, and the reasoning is not satisfactory. But there is a strong line of authority holding that judgments against married women, rendered upon default or confession, in actions to which coverture would have been a defense, are void, and may be so treated wherever and whenever called in question.[10] In all of these cases the question whether the judgment was void or merely voidable was the principal one. There are also many *dicta* to the effect that such judgments are void.[11] On the other hand a strong line of authorities hold that, while such a judgment may be voidable on proper proceedings in error it is not void, and, until reversed or set aside, is binding upon a married woman in any collateral proceedings.[12] Whether such judgments are voidable only or absolutely void, determines their effect as estoppels.

§ 5. *Theory of Waiver of Defense, etc.*— Some cases holding such judgments voidable only, proceed upon the ground that coverture, like infancy, usury, and the statute of limitations, is a personal defense which may be waived. A married woman, having been notified of the pendency of the action, and having neglected to make her defense is, according to these cases, held to have waived it.[13] Another ground taken by the best cases holding such judgments voidable only is well stated in Ganbrette v. Brock, 41 Cal. 78: "There would be no safety in purchasing at judicial sales, under judgments rendered after due service of process on female defendants, if the title of the purchaser could be defeated by proof in a collateral action that the defendant was a married woman at the time of the institution of the suit."[14] This is an extension of the theory of waiver, and is similar to an equitable estoppel; *i. e.*, that a married woman standing by and neglecting to assert her rights, and thereby inducing others to act in ignorance of them, will not be permitted afterwards to assert them to the injury of such person.[15]

§ 6. *Real Nature of the Disability of Coverture, and its Effects upon such Judgments.* —The cases holding such judgments absolutely void are by far the best considered ones. In Morton v. Meader and Higgins v. Peltzer especially, the authorities are well

[6] Kilheffer v. Herr, 17 Serg. & Rawle, p. 525.

[7] Bigelow on Estoppel: Introduction.

[8] Co. Lit. 260 a.

[9] Morse v. Tappan, 3 Gray, 411.

[10] Griffith v. Clarke, 18 Md. 457; Norton v. Meader, 4 Sawyer, 603, at 620; Cary v. Dixon, 51 Miss. 593 (citing many Miss. cases); Banks v. Partee, 99 U. S. 331; Graham v. Long, 65 Pa. St. 383; Vandyke v. Wells, 103 Pa. St. 49 (citing many Pa. cases); Higgins v. Peltzer, 49 Mo. 152; Parsons v. Spencer, 83 Ky. 305, etc.

[11] The best are: Morse v. Tappan, *supra;* Dorrance v. Scott, 3 Whart. 304; Wallace v. Rippon, 2 Bay (S. C.), 42.

[12] Washburne v. Gouge, 61 Ga. 512; Howard v. North, 5 Tex. 290; Phelps v. Bradset, 24 Tex. 236; Sheppard v. Kendel, 3 Humph. 81; Wagner v. Ewing, 44 Ind. 441 (and other cases in Ind.); Cullen v. Ellison, 13 Ohio St. 446; Keith v. Keith, 26 Kas. 25; Guthril v. Howard, 32 Iowa, 54 (and other cases in Iowa); and several other cases (including two English) cited in the next two sections. This is stated as the law by Mr. Bishop; Married Women, 486.

[13] Wilson v. Coolidge, 42 Mich. 112; Green v. Pranton, 1 Dev. Eq. 504. This view is taken in an article in 5 Cent. L. J. 151, also in Herman on Estoppel.

[14] The following cases proceed upon similar reasoning: McCurdy v. Baughman, 43 Ohio St. 78; Vido v. Pope, 81 N. C. 22; Burke v. Hill, 55 Ind. 419 (discussing authorities). So Freeman on Judgments, 150.

[15] This is the reasoning, substantially, in Howard v. Hale, 5 Lea, 405.

collected and examined. Of the cases *contra*, Burk v. Hill is perhaps the best considered, citing and examining more of the authorities. Most of the cases holding this view dispose of the question summarily, and it is probable that more than one was influenced by local statute partially removing the disabilities of coverture. But the best cases on the subject, as far as the reasoning is concerned, are Parsons v. Spencer, *supra*, and Spencer v. Parson, 13 S. W. Rep. (Ky.) 72. In the latter case, the court speaking of the nature of the incapacity of a married woman, says: "Her existence is merged in that of the husband and she can make no contract binding herself personally or subjecting her to a judgment *in personam*. In equity it may be enforced as against her separate estate, if she so intended, but she incurs no personal liability by it, because she has legally speaking no separate existence, and it must be satisfied out of her estate by *in rem* proceedings. * * * There is, then, so far as she is concerned, no person within the court's jurisdiction." It is believed that these cases represent the law, notwithstanding English cases to the contrary.[16] The English cases are not well considered, and in them the question of estoppel did not arise. Like Phelps v. Bracket and Sheppard v. Kendel, *supra*, they hold that coverture, like infancy, etc., must be pleaded, and cannot be shown for the first time on error, motion in arrest of judgment, etc. But on principle this cannot be so. The incapacity of a married woman must be distinguished from that of an infant;[17] and her defense differs from the defense of the statute of frauds or statute of limitations. These are mere barriers which a defendant may or may not raise, and which he may well be held to waive, if he does not set them up. An infant, in spite of his incapacity, has a personal existence in law, and he may ratify his acts when he comes of age. But the contract of a married woman is absolutely void; she cannot ratify it on becoming sole. Her defense, at least historically, is not a mere protection as in the case of an infant, but arises from the policy of the common law, which considers husband and wife as one person, and completely does away with the personality of the wife.[18]

[16] The English cases are: Dick v. Tolhausen, 4 H. & N. 695; Moses v. Richardson, 8 B. & C. 421.

[17] Kemp v. Cook, 18 Md. 130, at 138.

§ 7. *Effect of Married Women's Property Acts.*—In many States recent statutes do away with all the disabilities of married women and allow them to sue and be sued as if sole. Under such statutes judgments against married women are binding in all respects as if they were sole.[19] Often, however, the disabilities of married women are only partially removed by statute. Such statutes remove their disabilities as to their separate estate and debts and contracts arising out of or relating to such property, or incurred or entered into in the maintenance of their families. These statutes vary greatly in their terms. A large number of questions arise as to how far judgments can be rendered under them. But such questions arise rather upon the validity and effect of the debt or contract and the construction of the statute, than upon the law of estoppel, and are not within the scope of this paper. All that can be said here is, that such statutes are strictly construed, and that in general the record must show that the cause of action upon which the judgment was rendered was one within the cases specified in the statute. Otherwise the judgment will be held either voidable or void according to the view taken by the court.[20] How far a married woman will be estopped by unauthorized judgments on confession or default under these statutes will depend upon the view of the court as to whether they are voidable merely or absolutely void. If voidable, she is estopped by them in all collateral proceedings; if void, they are of no effect in any proceedings. It is believed that the better view is that such judgments are absolutely void, and work no estoppel upon the married woman against whom they are rendered. There are numerous authorities to the contrary, but this view is well supported by the cases and is strictly in accord with the common law conception of married women.[21]

§ 8. *Estoppel of Married Women by Deed.*

[18] See Black on Judgments, 190; Reeve, Domestic Relations, 171.

[19] The decisions are legion. See Herman, 174, Black, 192.

[20] See Black, 191; Bishop on Married Women, 111; Bank v. Partee, *supra*; Cary v. Dixon, *supra*; Wallace v. Rippon, *supra*; Keith v. Keith, *supra*; Glover v. Moore, 60 Ga. 189. Also see *post*, § 13.

[21] Where the judgment is based on a cause of action for which she is liable, it is very different. Brown v. Kemper, 27 Md. 667.

—"An estoppel by deed may be defined to be a preclusion against the competent parties to a valid sealed instrument to deny its force and effect by any evidence of inferior solemnity."[22] Questions now arise principally on conveyances. At common law a married woman did not hold real estate separately as she now does under the statutes. Her husband was seized of all her lands during coverture. She could convey her realty or her dower right in her husband's realty only by fine or recovery or by proceedings before courts of record wherein she was separately examined. Courts of equity modified the practical effects of this by providing separate estates; but in this country, from an early period, separate estates have been provided for by statute, and some form of conveyance by acknowledgment before a magistrate established. These statutes have been strictly construed, and the separate estate created by them is a legal, not an equitable estate.[23] In order to work an estoppel a deed must be a valid one, and the parties to it competent.[24] Hence a married woman at common law is not estopped by her deed; nor, according to the better rule, by covenants, as of warranty in her deeds of conveyance. Where her deed fails as a conveyance, it is ineffectual for all purposes.[25] And where statutes provide for the barring of a married woman's dower, or the conveyance of her statutory estate by deed, or by joining her husband in a deed, she will not be estopped by such deed to set up an after-acquired title.[26]

§ 9. *Effect of Covenants and Recitals.*—A married woman being unable to make a contract, is not liable in damages on the covenants in her deed, even of her separate estate under the statute, unless the statute so provides.[27] But certain early cases said that she was estopped by a covenant of warranty from asserting an after-acquired title.[28] These cases, except Hill v. West, are not much more than *dicta*. There are some later cases to this effect, but most of them arise under statutes.[29] It should be observed that in Massachusetts the courts had established, on the ground apparently of long usage, that a married woman could be estopped as to her dower by releasing it in a deed with her husband.[30] The view taken by the cases cited in notes 28 and 29 is based on a misconception of the disability of married women and the nature of their statutory estate, and they are now pretty generally overruled.[31] In Shumaker v. Johnson, 35 Ind. 36, it is said that while such a covenant may not operate as an estoppel in its character of a covenant, it may have that effect in the character of a representation upon grounds similar to an equitable estoppel. This is based upon the doctrine of Van Rensalaer v. Kearney, 11 Hun, 297, and is the only case in which married women have been considered estopped by recitals, except Jones v. Frost, *supra*. But it is open to the same objection as the doctrine of waiver in case of judgments against married women. It ignores their disability. Furthermore there is no equitable estoppel of married women by their contracts. Accordingly there are strong authorities against such a rule.[32] The general and true rule is, that recitals in deeds of married women are confined to their estate at the time of conveyance, and that married women empowered by statute to convey their separate estate, but without further capacity are not bound by the conveyance, nor by any covenant or recital contained therein so as to be estopped from asserting a right or title subsequently acquired.[33] There is indeed an equitable estoppel by deed which will receive more attention when we come to consider

[22] Bigelow on Estoppel, 276.

[23] Bishop on Married Women, 111; Gebb v. Rose, 40 Md. 387. This distinction should always be kept in mind in examining the English cases. In England the separate estate is (or was until very recently) an equitable one.

[24] See definition, *supra*.

[25] Lowell v. Daniels, 2 Gray, 161; Strawn v. Strawn, 50 Ill. 33; Grove v. Todd, 41 Md. 633; Hopper v. Demarest, 21 N. J. L. 525. In Jones v. Frost, L. R. 7 Ch. App. 773, it is said that a married woman is estopped by her recitals in a deed as if she were sole. This does not pretend to be more than a *dictum*, as in that case the deed was a valid one which she had power to make. But see note 23, *supra*.

[26] Preston v. Evans, 56 Mo. 476; Jackson v. Vanderheyden, 17 Johns. 167; Wight v. Shaw, 5 Cush. 56.

[27] Rawle on Covenants for Title, 305.

[28] Massie v. Sebastian, 4 Bibb, 436; Colcord v. Swan, 7 Mass. 291, and other early cases in Massachusetts; Hill v. West, Lessee, 8 Ohio, 222.

[29] King v. Rea, 56 Ind. 19. See Rawle, l. c.; Devlin on Deeds, 1287.

[30] Fowler v. Sheaver, 7 Mass. 21; Bigelow (Estoppel, Ch. X) states this as a general proposition of law in the absence of statutes. On this subject see note of I. F. Redfield, 1 Am. Law Reg. 108, 612.

[31] Lowell v. Daniels, 5 *supra*; Wight v. Shaw, *supra*; Hopper v. Demarest, *supra*.

[32] Besides cases cited above, see Chawin v. Wagner, 18 Mo. 553; Plummer v. Lord, 5 Allen, 460; also for other objections see 34, *post*.

[33] Preston v. Evans, *supra*.

equitable estoppels in general. Suffice it to say here that courts will not by means of an estoppel permit a married woman to convey her estate in a manner which the statute does not allow. To hold otherwise would nullify the statute: "equity follows the law."[34] Where the statute entirely removes the disabilities of married women, and permits them to contract and to sue and be sued in all respects as if sole, there can be no doubt that they will be estopped, by their deeds and the covenants and recitals therein, like all other persons *sui juris*.[35]

§ 10. *Estoppel in pais.*—"An estoppel *in pais* is an indisputable admission arising from the fact that the party alleging it has been induced by the action of the party against whom it is alleged to change his position."[36] This definition is plainly intended for the modern estoppel *in pais*, which is in reality equitable estoppel, and is administered in courts of law as well as in courts of equity. The original estoppel *in pais* was so harshly administered and was often so inequitable in its results, that it was not favored by the courts. So that gradually it has given away to or been fused with equitable estoppel, which the courts favor and which is never applied to produce an inequitable result. Equitable estoppel is generally treated of in the books under the head of estoppel *in pais* (though in his last edition Bigelow treats it in a distinct chapter, but under "Estoppel *in pais*"), and it is perhaps hardly worth while to maintain a distinction since the technical estoppel *in pais* of the early writers has practically disappeared. But equitable estoppel, as administered in the courts of equity, still has some distinct importance as will be seen hereafter, and many branches of the doctrine are peculiarly equitable, and must, therefore, always have separate treatment.

§ 11. *Estoppel in pais of Married Women.*—The acts or representations which give rise to an estoppel *in pais* are of two kinds. They may be contracts or in the nature of or arising out of contracts, or they may be in the nature of tort (that is either positive torts or wrongs not arising out of contract). This distinction furnishes the rule for determining in what cases married women are estopped by their acts *in pais*. At common law, a married woman is absolutely incapable of making a valid contract. If, her contract being void, the courts were to hold that she could be estopped by it from claiming rights inconsistent with it, she would be enabled to do indirectly by means of an estoppel what the policy of the law prevents her from doing directly. How can she effect by mere acts, *in pais*, of no validity in themselves, that which she is incapable of doing by deed?[37] The same reasoning has been applied to equitable estoppels. "If, through the administration of equity, we can produce a result which the law denies *ab initio* on grounds of public policy, then estoppel will accomplish what the law and policy have forbidden. But we have seen that in such a case equity does not overturn but follows the law?[38] A married woman was, however, liable at common law for her torts, though it was necessary to join her husband; and husband and wife were liable for personal wrongs committed by her or for frauds committed for her upon third person. There can be no reason, therefore, why she should not be estopped by her fraudulent acts when they amount to a tort. To hold thus conflicts in no way with her disability, and to apply equitable estoppel to her in cases when the acts are not contractual in their nature, is not only equitable, but, so far from conflicting with the law, it may well be said to follow the law. Accordingly the authorities, almost without exception, hold her estopped in cases of fraud unmixed with the contract.[39] It is true it has

[34] Glidden v. Strupler, 52 Pa. St. 403; Jones v. Reardon, 11 Md. 465 at 470. See Story Eq Jur. 177. In Bishop on Married Women, 490, the doctrine of Glidden v. Strupler is criticised, and the reasoning declared erroneous. But the author loses sight of the real nature of the wife's disability and of her estate. It is the policy of the law and the statute, that a married woman shall have no power to convey her estate but in the manner provided. She has no personal existence except as to the rights and liabilities created by the statute, and these are to be strictly construed and not extended merely by the acts. Otherwise the statute would be nugatory. The cases have made the principles much clearer since that work was written. See concluding section; Central Land Co. v. Laibley, 32 W. Va. 184.

[35] Yerkes v. Hadley (Dak.), 2 L. R. A. 363. See Sandford v. Kane, 133 Ill. 199.

[36] Bigelow on Estoppel—Introduction.

[37] Nowell v. Daniels, *supra*.

[38] Agnew, J., in Glidden v. Strupler, *supra* (at p. 403).

[39] The distinction is well brought out in Hodge v. Powell, 96 N. C. 64, and Weatherabee v. Farrar, 97 N. C. 106. See Am. & Eng. Cycl. of Law under Married Women; Bigelow on Estoppel (5th Ed.), 603. Also cases cited *post*.

been said in some cases that a married woman is not estopped by her acts *in pais* in any case.[40] But these are mere *dicta*, and the cases in which this broad statement is made, will be found to be cases wherein the estoppel set up grew out of a contract. On principle it is clear, that where the act relied upon is a tort or in the nature of a tort unconnected with contract, it must work an estoppel. The disability extends only to contracts. As coverture is no defense to an action for the wrong, it cannot well be urged against an estoppel founded on the wrong. Where it is sought to estop a married woman by her fraudulent acts, it should be ascertained whether or not the fraud is so connected with contract as to come within her capacity. For example, a married woman cannot be estopped by her representation that she is sole if made as an inducement to a contract. If the courts were to hold her estopped in such a case, her incapacity would in effect be removed, and she would be permitted to make a binding contract by means of a representation that she was sole. This comes within the rule in Glidden v. Strupler. "There is not a contract of any kind which a *feme covert* could make, * * * that could not be treated as a fraud. For every such contract would involve in itself a fraudulent representation of her capacity to sue."[41]

§ 12. *Special Consideration of Equitable Estoppel Applied to Married Women.*—It has been said more than once that equitable estoppels (as treated in courts of equity) apply to married women in all cases, and in Pomeroy's Equity Jurisprudence, it is stated that the preponderence of authority sustains this view.[42] But the cases cited do not sustain the position. In none of the English cases did the estoppel arise out of contract. Most of them are cases of laches and acquiescence in breach of trust, and all were affected by the fact that in England a married woman's estate is (or was) an equitable one. Of the American cases he cites, one was based on a contract, and one, at least, was decided under a statute. In Frazier v. Gelston the broad statement as to estoppel is a dictum. The case was one of laches—of a stale claim. Holding that a married woman cannot enforce a stale claim under certain circumstances, and holding her estopped by all her acts, *in pais* out of which an equitable estoppel might be raised, are two very different things. The weight of authority on this point is with Glidden v. Strupler and Lowell v. Daniels; they are well argued; especially the latter, and on principle are unanswerable.[43] "It must be admitted that the cases on this subject are, to a certain extent, conflicting. But much of the difficulty and confusion is due to a failure to observe the distinction between the cases which seek by the doctrine of estoppel to validate those contracts of a married woman which, by law, are declared void; and the cases where, in the absence of any contract or agreement, her conduct has been held to prevent her from asserting what would otherwise be a right."[44]

§ 13. *Effect of Married Women's Acts.*—Questions as to the effect of these acts can only arise in cases where the acts out of which the estoppel is sought to be raised are contracts, or arise out of contract. Where the

[40] Lowell v. Daniels, *supra*; Glidden v. Strupler, *supra*.

[41] Pollock, C. B., Liverpool v. Fairhurst, 9 Ex. 422; Keen v. Hartman, 48 Pa. St. 497.

[42] Pomeroy Eq. Jur. 814, citing Stafford v. Stafford, 1 D. G. & J. 143 (cases of laches); Jones v. Higgins, L. R. 2 Eq. 538 (laches); Jones v. Frost, L. R. 7 Ch. App. 773 (a *dictum*, see *ante*, 25); Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. 483; Frazier v. Gelston, 35 Md. 298 (laches), and other American cases. See also Herman on Estoppel, 1105, and *passim* to same effect. Pomeroy evidently took his idea as well as most of his citations from Bishop on Married Women, § 490. This broad doctrine laid down by Pomeroy has been copied quite generally. See 1 L. R. A. 522, note (where the limitations of estoppel in its application to married women are contrary to the case commented upon and the authorities cited). It is comparable to the equally broad statement to the contrary in Glidden v. Strupler and Lowell v. Daniels. Courts and text writers having in view cases arising from contract solely, or those not arising therefrom solely, have made statements apparently covering the whole ground. Pomeroy cites Glidden v. Strupler and Lowell v. Daniels, and appears to think that they conflict with the authorities cited by him, which in reality they do not at all. Only the *dicta* are in conflict. The distinction is well brought out in Galbraith v. Hunsford, 87 Tenn. 100. But certainly early English cases hold exactly what is laid down by Mr. Pomeroy: "Where a man who has a title, and knows of it, stands by and either encourages or does not forbid the purchase, he shall be bound * * * by it. Neither shall infancy or coverture be any excuse in such cases." Fonblanque's Equity, 164, citing Evroy v. Nichols, 2 Eq. Cas. Abr. 489; Becket v. Cordley, 2 Bro. R. 353. The fact that in America married women have separate legal estates by statute, which they can bind only in a specified manner, makes such cases inapplicable in this country.

[43] See Drurt v. Foster, 2 Wall. 24; Oglesby Co. v. Pasco, 79 Ill. 164; Rumtelt v. Clemens, 46 Pa. St. 455.

[44] Galbraith v. Lumsford, 87 Tenn. 89, at 100.

statute completely does away with the common law disability, and enables her to sue and be sued, and contract as if sole, she is estopped by her acts *in pais* as fully as any person *sui juris*. Some cases seem to have hesitated in reaching this conclusion, and it has been said that the court cannot refuse to take notice of the fact that the wife is still under the influence of her husband, and "to a large extent ignorant of business," as much so as before the statute.[45] But if the statutes make her *sui juris* in all respects, the courts cannot refuse so to regard her any more than they could remove her disability when the law imposed it.[46] Many statutes only partially remove the common law disability. The cases under these statutes are endless and apparently somewhat contradictory, and owing to this and the great diversity of these statutes, the subject is in some apparent confusion. The cases are collected, but well scattered, in the somewhat rambling work of Mr. Herman. They are well classified in Stewart on Husband and Wife, Secs. 409-420. It will be found in all of the cases that the question was not one of estoppel, but of how far the facts relied upon to work an estoppel came within the statute. Questions arise, not from any doubt as to the law of estoppel and its application to married women, but from the difficulty of construing the statutes and general questions as to their effects. If the acts or representations relied on, being contractual in nature, grow out of the separate estate or liability created by the statute (bearing in mind that in general the statute is strictly construed), she will be estopped by them. If they do not grow out of the estate or liability created by the statute, they are not sufficient to estop her. There is no doubt as to these general rules; the difficulty is in each case to determine whether and how far the facts set up arise out of the statutory estate or liability. Such questions are not within the scope of this article.[47]

§ 14. *Conclusions as to Estoppel of Married Women.*—A married woman is estopped in those cases, and only in those cases, where the same facts which are relied upon to work the estoppel would constitute a valid cause of action against her. Whether the estoppel sought to be raised arises out of a judgment, a deed or acts *in pais*, the question is, was there, in the eye of the law, a person in existence capable of being sued, of making the deed, of doing the acts? If a married woman cannot be sued on a covenant, how can she be estopped by it; if she cannot be sued on a simple contract, how can she be estopped by it; if she cannot be sued on the contract, how can she be estopped by a judgment rendered upon it by default, without acquiring by means of an estoppel a capacity which the law or the statute for reasons of policy deny her. On the other hand, her liability to be sued for certain acts creates a corresponding liability to be estopped by them. The only exception which can be made to this criterion is the case of estoppel by the record as a record; and that, as has been remarked, is not, like other estoppels, based on the act of the party, but, in modern times at least, is based entirely on grounds of policy. Is the married woman liable to an action upon the covenant or contract in question under the statute? Can she be sued in this particular case under the statute? These questions are decisive of the question whether she is estopped.[48]

Baltimore, Md. O. F. HERSHEY.

[45] Merriam v. Boston Co., 117 Mass. at 244; Herman on Estoppel, 191.

[46] Nash v. Mitchell, 71 N. Y. 200; Dobbin v. Cordiner, 41 Minn. 165, citing cases.

[47] The following cases later than the text books are important as illustrating the general rule: Cook v. Walling, 117 Ind. 9; Stivers v. Tucker, 126 Pa. St. 74; Sandsberry v. Cornin, 40 Mo. App. 373; Brick v. Campbell, 122 N. Y. 337; Logan v. Gardner, 136 Pa. St. 588; Jackson v. Torrence, 83 Cal. 521; Noel v. Kinney, 106 N. Y. 74.

[48] On liability, as the criterion, see: as to judgments Brown v. Kemper, 27 Md. 667 (tort); as to estoppel generally, Oglesby Co. v. Pasco, *supra*; Powell's Appeal, 98 Pa. St. 403; Nash v. Mitchell, *supra*. "To the extent that she is *sui juris*, she is subject to the law of estoppel." Co. Cent. R. R. Co. v. Allen, 13 Colo. 229. For discussion of the general principles of estoppel of married women, see Stewart on Husband and Wife, 409-420; Bishop on Married Women, 484-495.

FAILURE OF HUSBAND TO SUPPORT WIFE—ADVANCES BY THIRD PERSON—LIABILITY.

LEUPPIE V. OSBORN'S EX'RS.

Court of Chancery of New Jersey, June 7, 1894.

1. When a husband deserts or abandons his wife without making provision for her support, and a third person advances money to her, which she uses to ob-

tain necessaries, an equitable debt is thereby created, which the person making the advance may enforce by suit in equity.

2. In such a case it can make no difference to the husband whether he is held liable for money or for the price of necessaries, so long as no recovery can be had for money unless it is shown that it has actually been spent for necessaries.

3. This rule rests entirely on the fault of the husband, and cannot be applied to a case where the husband's failure in duty is the result of misfortune.

VAN FLEET, V. C.: The object of this suit is to establish an equitable debt and enforce its payment. The complainant rests his rights to the relief he asks on the following facts: Allan Osborn died in March, 1893, leaving a will, which has been admitted to probate, and by which he directs that all his just debts should be paid as soon as could be conveniently done after his death. For several weeks prior to his death, Mr. Osborn was so weak and helpless that he was unable to sign his name or to give any attention to any business. Before becoming so, he was always possessed of ready money, and provided well for his family, and it was his custom to pay cash for his family supplies. A short time prior to his death, the funds which he had placed in the hands of his wife became exhausted, and he, being unable, in consequence of his helplessness and sickness, to provide additional means, and his wife being in need of money for the support of his family, applied to the complainant for a loan of $100, to be expended for that purpose. The loan was made, and the money was expended in the purchase of such things as were necessary for the support of Mr. Osborn's family. Since Mr. Osborn's death, the complainant has requested the executors of his will to pay him, and they have refused. This suit is brought to compel payment. The defendants move the dismissal of the bill, on the ground that the case made by it does not entitle the complainant to relief.

The complainant contends that, as the money which he loaned to the testator's wife was spent for the support of the testator's family, he has a right, according to a well-settled rule of equity jurisprudence, to be subrogated to the rights of those who provided the necessaries, and to have his debt enforced in equity against the testator's estate, as they might have done at law, if the money which he loaned had not been used to pay for them. In England it is settled by authority, both ancient and modern, that when a husband has deserted his wife without making provision for her support, and a third person advances money to her, which she uses to obtain necessaries, an equitable debt is thereby created which may be enforced against the husband. The first reported case in which this principle was laid down is Harris v. Lee, 1 P. Wms. 482, decided in 1718. There a husband had twice given his wife "the foul distemper," in consequence of which she left him, and went to London to be cured. Before going, she borrowed money to pay doctors and for necessaries. The husband subsequently died, leaving a will by which he devised land to trustees for the payment of his debts. On a bill by the person who made the loan, it was held that he was entitled to recover. Sir Joseph Jekyll, M. R., in deciding the case, said: "Admitting the wife cannot at law borrow money, though for necessaries, so as to bind the husband, yet, this money being applied to the use of the wife for her cure and for necessaries, the plaintiff that lent this money must, in equity, stand in the place of the persons who found and provided such necessaries for the wife. Lord Campbell, in the subsequent case of Jenner v. Morris, 3 De Gex, F. & J. 45, 52, in trying to give the reason why equity, in such a case, subrogated the lender to the rights of the persons who provided the necessaries, said: "It may possibly be that equity considers that the tradespeople have, for valuable consideration, assigned to the party who advanced the money the legal debt which would be due to them from the husband on furnishing the necessaries." So far as the Reports show, no attempt was made to enforce the principle established by Harris v. Lee from 1718, when that case was decided, until 1849, when the case of May v. Skey, 16 Sim. 588, arose. In the case last named it appeared that a husband had gone abroad, and left his wife wholly unprovided for, and that the plaintiff, during the husband's absence, had lent his wife money, which she had used to obtain necessaries. Vice Chancelor Shadwell, in deciding it, distinguished it from Harris v. Lee, remarking that in Harris v. Lee there were trusts for the payment of the husband's debts, and that it was that which gave the court jurisdiction; and then added: "In this case there is no trust to execute; but the plaintiff sues merely as a creditor of the husband, and as a mere creditor he has no equity against the husband." The view of the vice chancellor seems to have been that in a case where there was no trust or other ground of equity cognizance, the question whether the plaintiff is or is not a creditor of the husband must be determined by a court of law. Jenner v. Morris was decided by Vice Chancellor Kindersley in 1860 (1 Drew. & S. 218), and, on appeal, by Lord Campbell and Lord Justice Turner in 1861 (3 De Gex, F. & J. 45). In this case it appeared that a husband had deserted his wife without making any provision for her, and without making any imputation of misconduct against her. After the desertion, the wife's brother advanced money to her, which she used to obtain necessaries, and he also paid for necessaries supplied to her by tradesmen. On the question whether or not, under these facts, the husband was liable, no doubt seems to have been entertained. Harris v. Lee was affirmed and followed, and May v. Skey overruled. In answer to an objection made by counsel that Harris v. Lee was a very old case, and did not appear to have been acted upon in modern times, Lord Justice Turner remarked that, in considering old author-

ities, it must be borne in mind that the decrees of the court very often furnish the very best evidence which can be had of the extent of its jurisdiction and of the principles by which it is guided, and that, in disregarding the older decisions, there is great danger of breaking in upon its principles. Deare v. Soutten, L. R. 9 Eq. 151, was decided by Lord Romilly, M. R., in 1869. In this, as in all the other cases where the husband was adjudged liable, it appeared that the defendant had deserted his wife, leaving her unprovided for, and that the plaintiff had advanced money to her, which she had used to obtain necessaries. On the authority of Jenner v. Morris, the husband was held liable. The principle established by Harris v. Lee was recognized by the Supreme Court of Pennsylvania in Walker v. Simpson, 7 Watts & S. 83; and the Supreme Court of Connecticut in Kenyon v. Farris, 47 Conn. 510, after a thorough examination of all the authorities, adopted it as an unquestionably sound rule of equity jurisprudence. The reasoning of the court in this case appears to me to be more convincing than that advanced in any of the prior cases. Stated in substance, it is to this effect: That it can make no difference to the husband whether he is held liable for money or for the price of necessaries, so long as no recovery for money can be had unless it is shown that it has actually been spent for necessaries; that, whether the wife obtains what she is entitled to by one means or the other, the law will discharge its whole duty to the husband by protecting him from liability for anything beyond necessaries, but it cannot discharge its duty to her unless it compels him to support her; if he has a choice as to the method in which he will extend support, the law will let him exercise it, but if he refuses to make a choice, and does not provide for her in any way, then she should have a right to resort to any means which will give her what she needs. Besides, it is not certain that the husband's credit will, at all times, give his wife what she is entitled to. Circumstances may arise when nothing but ready money will enable her to get what he is bound to furnish. This reasoning seems to me to be unanswerable.

By force of the principle under consideration, it is manifest that the husband's liability rests, not his misfortune, but on his fault,—on his refusal or failure to do his duty to his wife. It has no other foundation. It is only in cases where he has deserted or abandoned his wife without making provision for her support that he has been held liable for money advanced. That is the utmost extent to which his liability, by force of this principle, has as yet been carried. The bill shows that, when the loan in this case was made, the defendants' testator was unconscious or in a state of complete disability. He was so sick, weak, and helpless as to be incapable of doing any business of any kind. Now, unless pure misfortune, unmixed with fault of any kind, confers authority upon a wife to pledge the credit of her husband for money to buy necessaries, the wife's act in this case was wholly unauthorized, and imposed no liability on her husband. To hold a husband liable under such circumstances will, unquestionably, obliterate all distinction, in cases of this character, between fault and misfortune, and extend the principle under consideration to cases entirely foreign to both its letter and its spirit. The bill must be dismissed, with costs.

NOTE.—It is the duty of a husband, imposed upon him by law, to supply his wife with the articles necessary for her support according to his rank and condition in life. Since the wife ordinarily takes charge of family affairs, her cohabitation with him is considered to be presumptive evidence of the assent of the husband to being bound by her contracts for necessaries for herself and for her family. Furlong v. Hysom, 35 Me. 332; Clark v. Cox, 32 Mich. 204; Gotts v. Clark, 78 Ill. 229; Montague v. Benedict, 3 B. & C. 631; Green v. Sperry, 16 Vt. 390. If his conduct is such that the wife is compelled to live apart from him, she carries with her the authority as his agent, to bind him for supplies furnished to her for her necessary support McGrady v. McGrady, 48 Mo. App. 668. Such agency is implied by law though it may be a compulsory agency. Benjamin v Dockham, 134 Mass. 418. The husband is also liable if he sends his wife away, if he abandons her, and if they separate by mutual consent. Allen v. Aldrich, 29 N. H. 63. If, however, the wife leaves the husband without cause, or if, when she leaves, he has cause for a divorce, he cannot be held responsible for her necessaries. Allen v. Aldrich, *supra;* Sawyer v. Richards, 65 N. H. 185. The reason the law authorizes the wife to pledge her husband's credit is to prevent her being reduced to a state of destitution; consequently she has no such authority, when she has means to support her properly, no matter from what source they may be derived. Hunt v. Hayes, 64 Vt. 89. If the husband wishes to excuse himself from such liability, on the ground that he makes an allowance to a wife living apart from him, he must show that such allowance is reasonable and that it is regularly paid. McKinney v. Guhman, 38 Mo. App. 344. Such agency on the part of the wife being compulsory on the husband, he cannot, by notice to a tradesman not to furnish her goods on his credit, relieve himself from responsibility therefor, if she is not in fault and has not the means for her proper support. McGrath v. Donnelly, 131 Pa. St. 549; Benjamin v. Dockham, 132 Mass. 181; Barr v. Armstrong, 56 Mo. 577. If however, the supplies were not furnished on the credit of the husband, but on that of the wife, he is not liable therefor. Carter v. Howard, 39 Vt. 106; Bugbee v. Blood, 48 Vt. 497; Pearson v. Darrington, 32 Ala. 227. One, who furnishes necessaries to a wife living apart from her husband, has the burden of proof on him to show that the circumstances existed, which authorized her to render him liable therefor. Mainwaring v. Leslie, M. & M. 18; Thorne v. Kathan, 51 Vt. 520; Brown v. Worden, 39 Wis. 432; Bloomingdale v. Brinckerhoff, 20 N. Y. Sup. 858; McKinney v. Guhman, 38 Mo. App. 344; *Contra:* Allen v. Aldrich, 29 N. H. 63. It is the duty of a husband to furnish his wife with a home corresponding to his circumstances and condition in life (Shinn v. Shinn, N. J. Ch. 24 Atl. Rep. 1022); consequently she is entitled under the name of necessaries to live in a manner commensurate with his means, her wonted living as his wife and her station in the community. Bloom-

ingdale v. Brinckerhoff, *supra;* Seybold v. Morgan, 43 Ill. App. 39. Under the head of necessaries may be included food, drink, clothing, washing, physic and a proper place of residence. Thorpe v. Shapleigh, 67 Me. 235. Money furnished a wife to obtain transportation to join her husband was not considered to be furnished for necessaries. Donahue v. Tobin, 11 Pa. Co. Ct. 496. The husband was not required to pay the fees of a lawyer employed by his wife to prosecute him to compel him to support her, since there was a public prosecutor to attend to such suits (McQuhae v. Rey, 23 N. Y. Sup. 16), but he was required to pay her expenses incurred to protect her by articles of the peace against his own violence. Turner v. Rookes, 10 A. & E. 47. A husband is always held liable for his wife's funeral expenses as necessaries. Seybold v. Morgan, 43 Ill. App. 39. It is always a question for the jury to determine what is an adequate support for the wife. Hunt v. Hayes, 64 Vt. 89; McGrath v. Donnelly, 131 Pa. St. 549. In making such estimate property of every description belonging to the husband, even including pension money, must be taken into consideration. McGrady v. McGrady, 48 Mo. App. 668. At common law a wife could not sue at law or in equity to compel her husband to maintain her (Seybold v. Morgan, 43 Ill. App. 39), though she might obtain such a decree as incidental to other proceedings. Some courts in America follow the English rule, while others allow suits for maintenance either from statutory provision or for lack of other remedy. Garland v. Garland, 50 Miss. 694; Graves v. Graves, 36 Iowa, 310. One, who supplied money to a wife, could not at law sue the husband therefor (Stone v. McNair, 7 Taunt. 432), but equity allowed such suit, if the money were actually used for necessaries. Harris v. Lee, 1 P. Wms. 482; Kenyon v. Farris, 47 Conn. 510; Schullhofer v. Metzger, 7 Rob. (N. Y.) 576. In the principal case the court seems to ignore the fact, that the wife was living with her husband, and had an implied authority to bind him for necessaries procured for the family (see first part of the note). In such case we see no reason why equity might not be resorted to in order to compel payment since the money was applied to the purchase of necessaries. The court also says the husband is only liable when he has deserted or abandoned his wife, and he has not been held liable, when his failure to supply his wife was due to his misfortune—in this case his sickness. We find no such distinction made in the decisions. His failure to supply, regardless of the cause thereof, is given as the reason for his liability. Nor is it necessary for him to abandon his wife, since he is held liable in cases of voluntary separation. Allen v. Aldrich, 29 N. H. 63; Seybold v. Morgan, 43 Ill. App. 39. The principal case says that the husband's liability arises solely from his fault—that there is no other foundation for such liability. The English cases imply, that the principle was established to prevent the wife from becoming a burden on the community. Rex v. Flintan, 1 B. & Ad. 227; Regina v. Wendon, 7 Ad. & El. 819. The ideas of the court in this case seem to adhere to the bark to a remarkable degree.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION—Death of Plaintiff—Abatement.—An action by a married woman to protect her inchoate interest in her husband's real estate, conveyed by them in trust, will not, after a judgment in her favor, and after an appeal has been taken therefrom, abate, on account of her death, though her cause of action would not survive her.—KELLY v. KELLY, Ind., 37 N. E. Rep. 545.

2. ACTION BY ADMINISTRATOR—Pleading.—An allegation in a complaint that plaintiff is a duly appointed and qualified administrator of a deceased intestate is sufficient where no objection was made to it other than by oral demurrer at the trial. — MICKLE v. CONGAREE CONST. CO., S. Car., 19 S. E. Rep. 725.

3. ADMIRALTY—Shipping—Coasting Trade.—The statute prohibiting the transportation of merchandise between ports of the United States in foreign vessels (Rev. St. § 4347), is not violated by shipping goods from New York to Antwerp in one foreign vessel, and afterwards forwarding them by another to a California port, although this was the intention from the outset. — UNITED STATES v. TWO HUNDRED AND FIFTY KEGS OF NAILS, U. S. C. C. of App., 61 Fed. Rep. 410.

4. ADVERSE POSSESSION — Possession by Tenant. — Where one does not intend to claim as her own a small tract of land included within her inclosure, her possession is not adverse. — PHARIS v. JONES, Mo., 26 S. W. Rep. 1032.

5. APPEAL—Action on Bond.—An appeal bond which is given in a cause in which no appeal lies, and which does not operate to stay execution, creates no liability. —STEELE v. CRIDER, U. S. C. C. (Kan.), 61 Fed. Rep. 484.

6. ASSAULT—Punishment by School Teacher.—A school teacher is not guilty of assault for inflicting corporal punishment on a pupil for the breaking of a reasonable rule, where the punishment was administered in a reasonable manner.—MARLSBARY v. STATE, Ind., 37 N. E. Rep. 558.

7. ASSIGNMENT OF DEBT — Notice. — Notice by an assignee of a debt, due to the assignor from a partnership, given to the person in charge of the partners' store, is sufficient to give the assignee's claim priority over the claim of a creditor of the assignor who garnishes the partners after such notice. — MAY v. HILL, Mont., 36 Pac. Rep. 877.

8. ATTORNEY AND CLIENT—Compensation.—A client is not liable to an attorney for services rendered without his knowledge, at the request of the attorney employed by him.—MOORE v. ORR, Ind., 37 N. E. Rep. 554.

9. ATTORNEYS AT LAW—Admission of Women.—Code Va., 1887, provides that "any person duly authorized and practicing as attorney at law in any State or Territory of the United States, or in the District of Columbia, may practice as such in the courts of this State" (section 3192); and that every such person shall produce satisfactory evidence of his being so authorized, and take a prescribed oath (section 3193): Held, that the question whether women shall be admitted to practice under these provisions is for the determination of the Virginia courts alone, for the right to practice law in State courts is not such a privilege or immunity of a citizen of the United States as is guaranteed by the fourteenth amendment. — EX PARTE LOCKWOOD, U. S. S. C., 14 S. C. Rep. 1082.

10. BANK DEPOSIT IN ANOTHER'S NAME.—No one is presumed to have intended to make a donation. In case a person makes a deposit in bank for the account of another, pursuant to a previous agreement that on a certain condition the latter is to employ it for a designated purpose, and the former afterwards calls for the restitution of said sum before the fulfillment of said condition, he is entitled to have such custodian of the fund deposited respond to his call.—COONEY v. RYTER, La., 15 South. Rep. 382.

11. BANKS—Deposits—Set-off—Receivers.—Debts of a partner and his firm to a bank cannot, in equity, be set off by a receiver of the bank against trust moneys which the partner, after the debts were contracted, mingled with the firm deposits, without the bank's knowledge, and the whole amount of which remained continuously in the bank until it failed.—FISHER v. KNIGHT, U. S. C. C. of App., 61 Fed. Rep. 491.

12. BUILDING AND LOAN ASSOCIATIONS—Dissolution in Equity.—Where a building and loan association, organized under a statute which declares that borrowers may repay their loans at any time, and be entitled to a credit of one-eighth of the premium for each of the unexpired years of the association's eight-year period, is dissolved by a court of equity before the expiration of the eight-year period because it is losing money, the court called in all the loans, and distributed the proceeds among the stockholders, giving the borrowers credit for the unearned part of their premiums, as though they had voluntarily paid up, but gave them no credit on their loans for assessments and fines paid by them, since all the stockholders are alike responsible for the losses of the association.—TOWLE v. AMERICAN BLDG., LOAN & INV. SOC., U. S. C. C. (Ill.), 61 Fed. Rep. 446.

13. CARRIERS—Live Stock—Penalty.—Under Rev. St. §§ 4386 4388, forbidding interstate carriers of animals to confine them more than 28 consecutive hours without unloading for rest, water, and feeding, unless prevented "by storm or other accidental causes," and imposing a penalty for "knowingly and willingly" failing to comply with this provision, such unloading is excused by unavoidable causes only, and therefore not by an accident to a train, due to negligence.—NEWPORT NEWS & M. VAL. CO. v. UNITED STATES, U. S. C. C. of App., 61 Fed. Rep. 488.

14. CARRIERS—Negligence.—In an action for personal injuries received in a collision on an elevated street railway during a blizzard, it was error for the court to leave to the jury to determine whether the situation was such as to require defendant to have wholly suspended its efforts to move its trains at and before the time of the collision, where the storm had apparently abated, defendant's trains were crowded with passengers awaiting transportation, it was defendant's duty under its charter to operate its trains for the convenience of the public if practicable, and the forecast of the weather was favorable.—CONNELLY v. MANHATTAN RY. CO., N. Y., 37 N. E. Rep. 462.

15. CARRIERS — Passenger — Negligence — Proximate Cause.—Plaintiff, a passenger on defendant's train, was negligently set down after dark before she had reached her destination. The night was dark and cold, but plaintiff secured a conveyance, and was driven five miles to her destination, arriving there at 10 o'clock that night. The cold and exposure of the ride made her sick: Held, that whether plaintiff was guilty of contributory negligence in thus continuing her journey, and whether her injuries were the proximate result of defendant's negligence, are questions for the jury.—PITTSBURG, C. C. & ST. L. RY. CO. v. KLITCH, Ind., 37 N. E. Rep. 560.

16. CHINESE MERCHANTS — Firm Name.—Act Cong. Nov. 3, 1893, provides that a Chinaman seeking entrance into the United States on the ground that he was formerly engaged as a merchant therein must show that his business was conducted "in his own name:" Held, that such person must be excluded where it appears that the business was conducted under a firm name of which his own name was no part, though there is evidence that he was a partner, and that Chinese merchants do not, in general, conduct business in individual or partnership names.—IN RE QUAN GIN, U. S. D. C. (Cal.), 61 Fed. Rep. 395.

17. CLAIM AND DELIVERY—Title.—A bill of sale, reciting that for a consideration "paid by W, agent" for plaintiffs, "I hereby sell and convey" a stock of goods, vests the title, not in the agent, but in plaintiffs, though the contract is signed in the name of the agent; and they may maintain an action of claim and delivery to recover the goods so conveyed.—J. M. HAYES WOOLEN CO. v. MCKINNON, N. Car., 19 S. E. Rep. 761.

18. COMPOSITION WITH CREDITORS—Secret Agreement. —The creditors of an insolvent partnership signed a composition agreement to take 4 per cent. of their claims, to be paid by four notes, made by the members of the firm, for 10 per cent. each, payable at different times,—the two last due to be indorsed by defendant. Plaintiff, a creditor, obtained, by a secret agreement, defendant's indorsement on the two other notes: Held, that the secret agreement vitiated only the contract securing to plaintiff the additional security, and did not prevent a recovery by him on the third note, which was executed according to the composition agreement.—HANOVER NAT. BANK OF CITY OF NEW YORK v. BLAKE, N. Y., 37 N. E. Rep. 519.

19. CONSTITUTIONAL LAW — Claims against Railroad Companies.—Act April 5, 1889, providing that railroad companies failing to pay claims for stock killed and certain other claims within 30 days after presentation thereof are liable in each case for an attorney's fee not exceeding $10 is an exercise of the political power declared by Const. art. 1, § 2, to be "inherent in the people, and does not infringe the pledge therein to preserve a republican form of government."—GULF, C. & S. F. RY. CO. v. ELLIS, Tex., 26 S. W. Rep. 985.

20. CONSTITUTIONAL LAW — Interstate Commerce — Tolls on Bridge.—Traffic across a river between States is interstate commerce, and a bridge over such river is an instrument of interstate commerce; and therefore a State has no power to fix charges for transportation of persons and property over a bridge connecting it with another State, without assent of congress or the concurrence of such other State.—COVINGTON & C. BRIDGE CO. v. COMMONWEALTH OF KENTUCKY, U. S. S. C., 14 S. C. Rep. 1087.

21. CONSTITUTIONAL LAW—Trial by Jury.—Gen. Laws, ch. 258, § 4, requiring an appellant from a sentence of a justice of the peace to pay certain fees, is not an infringement of the constitutional right to a trial by jury, as the amount of such fees is less than the amount of those required by the provincial act of 1718, which was

in force at the time of the adoption of that provision of the constitution.—STATE v. GRIFFIN, N. H., 29 Atl. Rep. 414.

22. CONTRACTS—Construction—Dissolution of Corporation.—An obligation in a contract providing for the organization of a corporation and that defendant shall have the management thereof, and in consideration shall guaranty plaintiff a dividend of not less than 7 per cent. per annum for seven years, terminates *prima facie* with the dissolution of the corporation.—LORILLARD v. CLIDE, N. Y., 37 N. E. Rep. 489.

23. CONTRACT—Construction—Erection of Factory.—Plaintiff contracted to erect a factory for $5,000. The contract provided that the undersigned subscribers would pay that amount when the factory was completed. The subscribers also agreed to incorporate with a capital stock of not less than $5,000, to be issued in proportion to the subscribers' paid up interests, and it was further agreed that each stockholder should be liable only for the amount subscribed by him. Thereafter the corporation was organized, and appointed a committee, which selected the site, and accepted the factory when completed: Held, that the corporation was not liable on such contract.—DAVIS & RANKIN BLDG. & MANUF'G CO. v. HILLSBORO CREAMERY CO., Ind., 37 N. E. Rep. 549.

24. CORPORATIONS — Amendment of Charter.— The manufacture and sale of electricity by a corporation organized under a special charter to furnish a city and its inhabitants with gas, as its sole business, is not an engaging in business not authorized by its charter, within the prohibition of Const. art. 14, § 5, when, before it commenced such manufacture, its charter was amended, under Act Dec. 12, 1888, so as to empower it to engage therein.—STATE v. MONTGOMERY LIGHT CO., Ala., 15 South. Rep. 347.

25. CORPORATIONS— Dissolution— Receivers.—A corporation is not dissolved by the appointment of a receiver, but continues to exist until dissolved by surrender or judicial decision.—STATE v. STATE BOARD OF ASSESSORS, N. J., 29 Atl. Rep. 442.

26. CORPORATIONS—Right of Stockholder to Sue.—A stockholder of a corporation that is in the receiver's hands has no right to sue upon a cause of action in favor of the corporation upon refusal of the receiver to sue on the shareholder's request, without showing that he has asked the court that appointed the receiver to direct him to sue.—SWOPE v. VILLALD, U. S. C. C. (N. Y.), 61 Fed. Rep. 417.

27. CORPORATIONS—Stockholders—Personal Liability.—Proceedings against stockholders in enforcement of calls for contributions by means of executory process are in affirmance of the contract of subscription, and not proceedings of forfeiture, and they are governed by different rules as to their effects. — SUCCESSION OF THOMPSON, La., 15 South. Rep. 379.

28. COUNTY—Services of Physician.—A county is liable to a physician for services rendered a poor person at the request of a township trustee, when the regular physician employed by the board of commissioners is infirm, and unable to attend to such person.—BOARD OF COM'RS OF LAWRENCE COUNTY v. MCLAHLON, Ind., 37 N. E. Rep. 557.

29. CREDIT INSURANCE—Construction of Contract.—An insurance against loss, in a certain ratio, resulting from sales on credits, containing a stipulation that only losses incurred by sales to persons whose capital as well as credit was rated in Bradstreet should be taken into the account: Held, that a loss of the kind mentioned accruing from the failure of a corporate customer was not within the insurance, as the capital of corporations was not rated in Bradstreet.—UNITED STATES CREDIT SYSTEM CO. v. ROBERTSON, N. J., 29 Atl. Rep. 421.

30. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—The mere fact that deceased did not die until two months after the statement sought to be introduced as a dying declaration is no reason for its exclusion.—BOULDEN v. STATE, Ala., 19 S. E. Rep. 341.

31. CRIMINAL LAW—Homicide—Adultery of Wife.—If a man does not kill his wife, whom he has caught in the act of adultery, until there has been time for his passion to cool, or if he kills her immediately, but is not moved thereto by the heat of passion, but by prior malice, hatred, or by any other motive except such as is presently engendered by his rage caused by such provocation, he is guilty of murder.—MCNEILL v. STATE, Ala., 15 South. Rep. 352.

32. CRIMINAL LAW—Murder—Evidence.—One indicted for murder, having testified in his own behalf, may be asked on cross-examination whether he had not been convicted for murder of another man, though the conviction was set aside, and upon a new trial he was acquitted.—HARGROVE v. STATE, Tex., 26 S. W. Rep. 993.

33. CRIMINAL LAW—Receiving Verdict —Place. — Under Code, § 749, requiring the Circuit Court to be held each year in the county courthouse the verdict must be delivered at the courthouse, and if received by the judge at his hotel, on account of sickness, it is void.—JACKSON v. STATE, Ala., 15 South. Rep. 351.

34. CRIMINAL PRACTICE—Burglary.—The grand jury may be organized at any time during the term. A charge that the intent to steal must have existed "before and not after" accused entered the house is properly refused.—JACKSON v. STATE, Ala., 19 S. E. Rep. 344.

35. CRIMINAL PRACTICE—Information.—The pendency of one information does not prevent the filing of another for the same cause.—STATE v. KEENA, Conn., 29 Atl. Rep. 470.

36. DOWER—Assignment.—When a husband, during his life, has divided his land into several parcels, and aliened those parcels to different purchasers, dower is to be assigned to his widow in each separate tract, and not in the whole original tract.—DROSTE v. HALL, N. J., 29 Atl. Rep. 437.

37. EMINENT DOMAIN — Compensation. — Plaintiff owned a lot between two much wider lots, all three abutting on an established street running north and south. The north side line of plaintiff's lot coincided with an extension of the south line of an established cross street. The adjoining owners platted their lots in such a manner that the cross street was not extended along plaintiff's lot, seriously affecting its value: Held, that the "damage" consequent to plaintiff's lot was not within Rev. St. 1889, § 1815, and such as the city became liable for by approving said plats.—FUNKE v. CITY OF ST. LOUIS, Mo., 26 S. W. Rep. 1034.

38. EMINENT DOMAIN—Deposit of Damages.—Where, under Mansf. Dig. § 5464, the court in condemnation proceedings orders a railroad company to deposit money to secure the payment of damages for land taken by it, the company is entitled to a refund thereof upon dismissal of such proceedings, where it had not entered upon, taken, or injured any of the land in question.—REYNOLDS v. LOUISANA, A. & M. RY. CO., Ark., 26 S. W. Rep. 1039.

39. EVIDENCE—Note— Hardwriting.—A witness who testifies to the genuineness of a signature may be asked his opinion concerning the genuineness of other signatures, prepared for the purpose, in order to test the value of his evidence.—BROWNING v. GOSNELL, Iowa, 59 N. W. Rep. 340.

40. FRAUDS, STATUTE OF — Memorandum. —A letter written by defendant to plaintiff, acknowledging that he had given to plaintiff an option on certain land, and alleging that plaintiff's failure to comply therewith, is insufficient to validate an oral contract for its sale, made after the option was given.—WILLIAMS v. SMITH, Mass., 37 N. E. Rep. 455.

41. FRAUDS, STATUTE OF—Sale of Land.—Under Code Ala. § 1732, subd. 5, which excepts from the statute of frauds parol contracts for the sale of land where "the purchase money, or a part thereof, is paid, and the purchaser put in possession of the land," an action will lie for the balance of the price though the pur-

chaser never executed any written agreement to purchase.—PARRISH v. STEADHAM, Ala., 15 South. Rep. 354.

42. FRAUDULENT CONVEYANCES—Change of Possession.—A sale of horses by a man to his wife is void as to his creditors, under Civ. Code, § 3440, providing that a transfer not followed by an actual change of possession is void, where he managed them after the sale just the same as before, though he did so as the purchaser's agent.—MURPHY v. MULGREW, Cal., 36 Pac. Rep. 857.

43. FRAUDULENT CONVEYANCES — Conditional Sale—Possession.—Where a bill of sale is made under an oral agreement that it shall be delivered only upon the happening of a certain event, the sale, being conditional, is not fraudulent and void as to creditors, under Mills' Ann. St. § 2027, because the seller retains possession of the property till the condition transpires. —ROBERTS v. HAWN, Colo., 36 Pac. Rep. 886.

44. FRAUDULENT CONVEYANCES — Evidence.—A bank, acting in good faith to protect itself, may take a mortgage to secure paper discounted for a customer, though an ulterior purpose of the mortgagor may be to defraud his creditors.—JOHNSTON v. DUNN, N. J., 29 Atl. Rep. 361.

45. FRAUDULENT CONVEYANCES — Husband and Wife. —The fact that a wife was indebted to her husband does not show that a conveyance by her to him was not fraudulent.—BUNCH v. HART, Ind., 37 N. E. Rep. 537.

46. FRAUDULENT CONVEYANCES—Possession.—Where the owner of a large pasture on which he and another live in separate houses, pasturing their horses together, sells to such other some of his horses, and these remain in the pasture as before, no fraud is presumed against the purchaser. — TRADERS' NAT. BANK OF FT. WORTH v. DAY, Tex., 26 S. W. Rep. 1049.

47. GARNISHMENT—Answer—Verification.—The attorney at law of a corporation, who does not profess to be its agent in any other capacity, is not competent to verify on its behalf an answer to a summons of garnishment; but the answer may be verified by any agent of the corporation who can and will depose positively to the facts stated therein. An answer sworn to by an agent "to the best of his knowledge and belief" is not properly verified, without a further statement pointing out what facts he knows and what facts he believes, together with the grounds of his belief. — PLANT v. MUTUAL LIFE INS. CO. OF NEW YORK, Ga., 19 S. E. Rep. 719.

48. GUARDIAN AND WARD—Accounting — Purchase of Land. — Where a guardian, with his own money, purchased land, on sale under a judgment, on which he held a subsequent mortgage for his ward, he will be deemed to have purchased it for the ward's benefit, subject to his right to be reimbursed for the money paid by him.—TAYLOR v. CALVERT, Ind., 37 N. E. Rep. 531.

49. HIGHWAY—Construction of Electric Railway.—A street railway, constructed in a highway under authority of law, with a roadbed which will admit of the free use of the highway by all other lawful means, operated by cars patterned after the style and size of cars ordinarily in use by horse railways, the motive power of which is electricity, supplied by means of overhead wires supported by poles planted in the sidewalks immediately within the curbs, is but a modification of the public use to which the highway was originally devoted, and is not an additional burden on the land, for which compensation may be required.—WEST JERSEY R. CO. v. CAMDEN, G. & W. RY. CO., N. J., 29 Atl. Rep. 423.

50. HIGHWAYS—Railroad.—Gen. St. § 2700, forbids the layout of a highway, not crossing a railroad track, within 100 yards of such a track, unless first approved by a judge of the superior court on a finding that "public convenience and necessity" require it there: Held, that the judge, in making this finding and approval, does not consider the question of expense and ability of the municipality therefor in the same manner as a committee appointed under *Id.* § 2713, to decide for or against a layout, but is to determine only whether it shall be allowed in that certain place.—CITY OF HARTFORD v. DAY, Conn., 29 Atl. Rep. 480.

51. HOMESTEAD OF WIDOW — Order Setting Aside.— An order setting aside a homestead to a widow, under Rev. St. art. 1993, requiring the exempt property of estates of decedents to be set apart for the widow, minor children, and unmarried daughters, is void as to one claiming a vendor's lien thereon, since section 2000 provides that no property of an estate upon which there is a vendor's lien shall be set aside, as exempt, until the lien is discharged. — FOSSETT v. MCMAHAN, Tex., 26 S. W. Rep. 979.

52. HUSBAND — Community Property. — Where the heirs of a deceased husband, after the death of their mother, receive more than one-half of their parents' property, they cannot recover their interest in community property conveyed by the mother after her husband's death, whether the grantees were *bona fide* purchasers or not.—BROWN v. ELMENDORF, Tex., 26 S. W. Rep. 1043.

53. HUSBAND AND WIFE—Competency as Witnesses.— How. St. § 7543, removing the disabilities of the connubial partners of parties to testify, does not render the wife a competent witness against her husband on a prosecution for murder, without his consent.—PEOPLE v. GORDON, Mich., 29 Atl. Rep. 322.

54. INSOLVENCY—Fraudulent Schedule.—The placing by the insolvent (without intent to defraud), on his schedule, claims which do not exist, and amounts which are to some extent exaggerated, does not amount to a fraud against other creditors, within the meaning of the insolvent laws. The claims of these creditors are mere matters of legal right, subject to be disputed or controverted in the concurso. — ROMANO v. THEIR CREDITORS, La., 15 South. Rep. 395.

55. INSURANCE — Conditions.—The owner of an elevator employed another to take charge of the business in their joint names, in consideration of half the profits, the owner advancing all the money necessary to buy grain and conduct the business: Held, that he was the sole owner of the grain within the meaning of an insurance policy.—TRADERS' INS. CO. v. PACAUD, Ill., 37 N. E. Rep. 460.

56. INSURANCE—Proof of Loss — Appraisement.—Several insurance companies having made a joint demand for a joint appraisal, upon proof of loss by the insured, finally notified the insured in a joint letter that, if the form of "submission to appraisers" which they had submitted contained any provision or condition limiting or defining the duties of the appraisers not prescribed by the several policies, each company would submit its own form, as they desired and demanded a submission free from any condition imposed by either party: Held, in a suit against one of said companies, where the policy stipulated for a separate appraisal, that, under the terms of the joint letter, the company thereby waived the appraisal, unless it thereafter submitted a form of appraisal within a reasonable time.—HAMILTON v. PHŒNIX INS. CO. OF HARTFORD, U. S. C. C. of App., 61 Fed. Rep. 379.

57. INSURANCE COMPANIES — Non-payment of Loss—Penalty.—Rev. St. Tex. art. 2953, providing that health and life insurance companies failing to pay a loss when due are liable for 12 per cent. of such loss in addition thereto, does not violate Const. U. S. Amend. 14, § 1, providing that no State shall deny the equal protection of its laws to persons within its jurisdiction.—UNION CENT. LIFE INS. CO. v. CHOWNING, Tex., 26 S. W. Rep. 982.

58. INTEREST ON JUDGMENTS AGAINST UNITED STATES. —The provision made by section 10 of the Act of March 3, 1887, for interest on judgments against the United States, does not apply to an action brought in the court of claims, under authority of a special act (Act March 2, 1889), to recover damages for injuries to a vessel by collision with a government pier; for the cause of ac-

tion, being a tort, is excepted out of the general statute, and, in the absence of any provision for interest in the special act, none is allowable.—WALTON v. UNITED STATES, U. S. C. C. (Penn.), 61 Fed. Rep. 486.

59. LANDLORD AND TENANT—Dissolution of Lease.—Where, pending a lease, work has to be done, which should have been done prior to the lease, in order to place the building leased in the condition in which it should have been to fulfill the lessor's warranty that it was fit and appropriate for the known use to which it was to be applied, the lessee has the legal right to a dissolution of the lease. The extent of the work to be done, and the extent of the inconvenience to be suffered by the lessee, do not control the rights of the lessee as to a dissolution. The warranty is indivisible.—DEAN v. BECK, La., 15 South. Rep. 357.

60. LIBEL AND SLANDER—Privileged Communication.—A statement made by a member of the city council, during a session thereof, in reference to the official conduct of the superintendent of streets, that he is a "downright thief," is not privileged, if at the time there was no proceeding before the council as to the latter's official conduct.—CALLAHAN v. INGRAM, Mo., 26 S. W. Rep. 1020.

61. LIFE INSURANCE — Beneficiaries—"Heirs at Law."—A Massachusetts benefit association's certificate, issued to a resident of that State, is to be construed by its laws, and, if written in favor of the member's "heirs at law," is payable to the persons (including the widow), and in the proportions, prescribed by the Massachusetts statute of distributions in the case of intestate personalty.—MULLEN v. REED, Conn., 29 Atl. Rep. 478.

62. LIFE INSURANCE — Death by Suicide—Damages.—In a suit on a life policy, where the application, which was made a part of the policy, contained the clause, "I also warrant and agree that I will not die by my own act within the period of two years from the issuance of said policy," and deceased designedly took his life within that period, plaintiff could recover if, when deceased took his life, his reasoning faculties were so impaired that he was unable to understand the consequences and effect of his act, or was impelled thereto by an irresistible insane impulse.—MUTUAL LIFE INS. CO. OF NEW YORK v. WALDEN, Tex., 26 S. W. Rep. 1012.

63. MARRIED WOMAN—Surety for Husband.—In this State a married woman may contract as surety for her husband.—BRIGGS v. FIRST NAT. BANK OF BEATRICE, Neb., 59 N. W. Rep. 351.

64. MASTER AND SERVANT — Assumption of Risk.—Plaintiff's husband was killed while in the employ of defendant as conductor in charge of a construction train, and acting under no superior orders, by the giving way of the road bed: Held, that defendant was not liable, as it furnished proper appliances, competent servants, etc., and deceased assumed the ordinary risks incident to its construction.—WALLING v. CONGAREE CONSTRUCTION CO., S. Car., 19 S. E. Rep. 723.

65. MEASURE OF DAMAGES—Contract.—For breach of contract to deliver to plaintiff daily, during a period of five years, a specified quantity of logs, the measure of damages is the difference, if any, between the contract price and the price at which logs could, by reasonable diligence, have been procured elsewhere; and where defendants, on the day after ceasing to deliver logs, resumed the work, able, ready, and willing to carry out the contract, and continued to haul logs until notified by plaintiff to discontinue, plaintiff can recover only for such loss as was sustained between their refusal to deliver and their resumption of the work.—HASSARD-SHORT v. HARDISON, N. Car., 19 S. E. Rep. 728.

66. MECHANIC'S LIEN — Appurtenances.—A portable steam engine is not a "building," and, in the absence of proof that it is a part of a building, is not an "appurtenance," under Gen. Laws, ch. 139, § 11, giving a lien to one who repairs a house or other building or appurtenances.—THOMPSON MANUF'G CO. v. SMITH, N. H., 29 Atl. Rep. 405.

67. MECHANICS' LIENS—Construction of Statute.—A statute gave a lien to any person furnishing materials, etc., to the owner of any building or other improvement, "or his agent," and further declared that "every contractor, subcontractor, architect, builder or person having charge either in whole or in part, of any building or improvement shall be held to be the agent of the owner for the purposes of this chapter." 1 Hill's Code Wash. § 1663: Held, that the enumerating words were all qualified by the words "person having charge," etc., and that one who merely contracted with the manager of a construction company, in his individual capacity, to furnish materials for use by the company, and afterwards purchased the materials from plaintiff, was not the agent of the company, so as to entitle plaintiff to lien.—PACIFIC ROLLING-MILL CO. v. HAMILTON, U. S. C. C. (Wash.), 61 Fed. Rep. 476.

68. MECHANICS' LIENS—Mortgages.—In an action to establish mechanics' liens against the owner and prior mortgagees, plaintiff claimed that the notes secured by the mortgagees were paid, and defendants gave evidence that they were not paid, but had been transferred to a third person: Held, that whether or not the notes were so transferred as to pass title was immaterial on such issue.—DAVIS v. JOHNSON, Colo., 36 Pac. Rep. 887.

69. MINES AND MINING—Location. — An instruction that if the mining ground in controversy was not within any valid location, or not "in the actual possession of one entitled thereto," the location was valid, is error, as submitting a question of law to the jury.—JORDAN v. DUKE, Ariz., 36 Pac. Rep. 896.

70. MORTGAGE—Foreclosure— Judgment.—Upon foreclosure of a railroad mortgage, a judgment for personal injuries will take precedence of the mortgage, in the distribution of the proceeds of sale (Code N. C. §§ 685, 1255), although the action on which the judgment was founded was not brought within 60 days of the registration of the mortgage.—FINANCE CO. OF PENNSYLVANIA v. CHARLESTON, C. & C. R. CO., U. S. C. C. (S. Car.), 61 Fed. Rep. 369.

71. MORTGAGE— Foreclosure—Note. — It is well-settled law that an assignee of a non-negotiable or matured debt takes it subject to all the equitable defenses that the original debtor may have. One who is about to become the assignee of such a debt must, at his peril, find out from the debtor whether there are any equitabe set-offs or defenses.—FISHER v. BULL, N. J., 29 Atl. Rep. 440.

72. MUNICIPAL CORPORATIONS — Altering Grade of Street.—A city has power to make changes in the grade of its streets, the fact that it has once graded the streets not exhausting its powers.—INHABITANTS OF THE CITY OF TRENTON v. MCQUADE, N. J., 29 Atl. Rep. 354.

73. MUNICIPAL CORPORATIONS—Bonds.—Under Comp. Laws Kan. 1885, ch. 19, art. 1, § 5, which declares that the powers granted to cities of the second class "shall be exercised by the mayor and council of such cities," and art. 7, § 111, which directs that funding bonds shall be duly issued only after an ordinance therefor shall be duly passed, funding bonds signed by the mayor of such city, and attested by the city clerk, under the city seal, without any ordinance or resolution of the mayor and council, are void. — SWAN v. CITY OF ARKANSAS CITY, U. S. C. C. (Kan.), 61 Fed. Rep. 478.

74. MUNICIPAL CORPORATIONS— Contract for Waterworks.—Rev. St. § 1589, providing that the mayor and board of aldermen may be empowered by ordinance to agree with a water company to supply the city with water, when authorized by a two-thirds vote of the qualified voters of the city, does not require the approval of the proposed contract by an election before the passage of such ordinance. — LAMAR WATER & ELECTRIC LIGHT CO. v. CITY OF LAMAR, Mo., 26 S. W. Rep. 1025.

75. MUNICIPAL CORPORATIONS—Repairs to Streets—Injuries to Abutting Owners.—Where a city is authorized to repair the streets as its officers deemed best, such officers are the exclusive judges of what repairs are necessary, and how they shall be made; and if damage results therefrom to an abutting owner from the cutting down of his trees, without negligence or wantonness on the part of the city, it is not liable liable therefor.—TATE v. CITY OF GREENSBOROUGH, N. Car., 29 S. W. Rep. 767.

76. NEGLIGENCE — Maintaining Dangerous Fence.—Where one of two adjoining land-owners builds a fence as required by Gen. Laws, ch. 142, § 1 *et seq.*, sufficient to prevent the escape of animals, yet neglects to keep it in repair, whereby the other abjoining owner's animals are injured, he is liable therefor at common law.—DURGIN v. KENNETT, N. H., 29 Atl. Rep. 414.

77. NEGOTIABLE INSTRUMENT — Assignee—Fraud. — The burden is on the assignee of a note tainted with fraud to show that he acquired it in good faith.—GALBRAITH v. MCLAUGHLIN, Iowa, 59 N. W. Rep. 338.

78. NEGOTIABLE INSTRUMENTS—Bona Fide Purchasers.—A creditor sent an unsigned draft to his debtor, who accepted and returned it. The debtor having made another purchase, the creditor sent a second draft for an amount including the second purchase, and without returning the first, which the debtor accepted. The creditor signed the first draft, and negotiated both: Held, that the first draft was good in the hands of a *bona fide* purchaser.—WHITTLE v. HIDE & LEATHER NAT. BANK, Tex., 26 S. W. Rep. 1011.

79. NUISANCE—Board of Health—Abatement of Nuisance.—The board of health in the township in which a nuisance exists, or is carried on, has the authority, and it is its duty, to abate such nuisance, either on its own motion, or by the aid of the court, though it is only hazardous to the health of individuals residing in another township. — BOARD OF HEALTH OF NORTH BRUNSWICK TP. v. LEDERER, N. J., 29 Atl. Rep. 444.

80. NUISANCE— Notice. — In an action against the grantee of land for the continuance of a nuisance erected by his grantor, notice to defendant that the erection was a nuisance is essential to plaintiff's cause of action, and it is not for defendant to show want of such notice.—CASTLE v. SMITH, Cal., 36 Pac. Rep. 859.

81. OYSTERS—Designation of Grounds.—Since Rev. St. 1875, tit. 16, ch. 4, § 6, permitted natural beds to be designated to any person for oyster culture, if the designation were in other respects legal, a designation made in 1875, whose irregularity was cured by the statute of 1877 (Laws ch. 94, § 2,) is not invalid because it covers a natural oyster bed.—STATE v. BASSETT, Conn., 29 Atl. Rep. 471.

82. PARTITION—Trial.— A proceeding for the partition of lands under the statute, is not at law, but in chancery, and was not intended as a substitute for, or equivalent of, an action of ejectment, or to be used for the sole purpose of testing a legal title, or trying an issue as to the same.—RIVIS v. SUMMERS, Fla., 19 S. E. Rep. 319.

83. PARTNERSHIP ACCOUNTING—Surviving Partner.—Where a surviving partner has conducted the business for six years to the advantage of all parties concerned, a decree declaring all the assets to belong to the old firm, and refusing to allow such partner any compensation for his services, or even credit for amounts paid a manager of the business, is erroneous. —PAINTER v. PAINTER, Cal., 36 Pac. Rep. 865.

84. PARTNERSHIP— Evidence—Reputation.—Common reputation cannot be considered to establish the fact of partnership.—KNARD v. HILL, Ala., 15 South. Rep. 345.

85. PRINCIPAL AND AGENT—Fraud—Mortgage Subrogation.—One who intrusts money to an agent to be invested in land, and whose agent fraudulently used the money to pay off a mortgage on certain land belonging to a corporation organized by the agent, may, on discovering the fraud, be subrogated to the rights of the mortgagee.— COTTON v. DACEY, U. S. C. C. (Kan.), 61 Fed. Rep. 481.

86. PUBLIC LANDS— Right of Way of Railroad. — Act Cong. March 3, 1875, which provides that "the right of way throught the public lands of the United States is hereby granted" to any duly-organized railway company which shall perform the conditions prescribed by the act, does not entitle such company to a right of way over lands which are in the possession of a qualified pre emptor who has made final proof, tendered the purchase money, and demanded his final receipt. — SPOKANE FALLS & N. RY. CO. v. ZIEGLER, U. S. C. C. of App., 61 Fed. Rep. 392.

87. QUIETING TITLE—Tax Deed. — The holder of a judgment lien cannot maintain an action to quiet title as against one who purchased at a sale under a tax lien superior to the judgment lien, without paying, or offering to pay, such superior lien. — BROWNING v. SMITH, Ind., 37 N. E. Rep. 540.

88. RAILROADS—Conveyance of Land.—Where a railroad contracts to buy land, and is notified by third persons not to pay the money to its vendor, and thereupon files a bill for payment into court, and interpleader, and the decree adjudges the title to be in said vendor, and orders the money paid to him, the company takes title by purchase, not by condemnation.—CHAMBERLAIN v. NORTHEASTERN R. CO., S. Car., 19 S. E. Rep. 743.

89. RAILROAD COMPANY—Contributory Negligence—Crossing.—The question whether a pedestrian was guilty of contributory negligence in not looking and listening at a railroad crossing for an approaching train, where the gates had not been lowered, is not a question for the jury, where the evidence leaves no doubt that, if such pedestrian had made any use of his senses, he could have both seen and heard, in due season, an approaching train, and thereby have avoided the accident which resulted in his death.—BLOUNT v. GRAND TRUNK RY. CO., U. S. C. C. of App., 61 Fed. Rep. 375.

90. RAILROAD COMPANIES— Defective Track.—In an action against a railroad company for personal injuries, the complaint alleged demailment of defendant's car, on which plaintiff was a passenger, and its collision with a bridge, precipitating the car into the river, and alleged that the proximate cause of such injury was the defective condition of defendant's track and bridge; that the track was constructed on a steep grade, through a deep cut, which was defective in having no ditches to carry off water from the track during storms: Held, to state a cause of action for negligence. — GALVESTON, H. & S. A. RY. CO. v. WALDO, Tex., 26 S. W. Rep. 1004.

91. RAILROAD COMPANIES—Expense of Fence.—In an action against a railroad company, under Rev. St. 1894, § 5323, *et seq.* (Elliott's Supp. § 1077, *et seq.*), to recover the expense of constructing a fence along plaintiff's land abutting on the railroad, evidence that the notice required by the statute was given 30 days before the action was brought, and that the road was in operation 12 months before the notice was given, is essential to a recovery.—CHICAGO & S. E. RY. CO. v. ABBOTT, Ind., 37 N. E. Rep. 557.

92. RAILROAD COMPANIES — Receivers—Stock-Killing Laws.—Under Sayles' Civ. St. art. 4245, making railroad companies liable without proof of negligence for cattle killed by their cars, if the track is unfenced, a receiver in exclusive control of an unfenced railway is liable in like manner for stock killed.—INTERNATIONAL & G. N. RY. CO. v. BENDER, Tex., 26 S. W. Rep. 1047.

93. REAL ESTATE BROKERS—Commissions.—A written authority to a broker to sell land at a net price per acre does not conclusively imply that the sale is to be for cash; and the facts that the amount is large, and most of the land is held on option, go to show that the point was left open for negotiation.—BOURKE v. VAN KEUREN, Colo., 36 Pac. Rep. 882.

94. REAL ESTATE BROKER—Commissions.—Where de-

fendant real-estate brokers, having had property put in their hands for sale, engaged plaintiff to procure a purchaser, agreeing to pay him a certain sum if he did so, plaintiff was entitled to such sum if he was the moving cause by which a sale was effected, though the purchaser actually closed the purchase with defendants.—LEONARD v. ROBERTS, Colo., 36 Pac. Rep. 880.

95. RECEIVERS — Insolvency — Benevolent Associations—Transfer of Funds.—In an association like the Iron Hall, where all the members, although residing in different jurisdictions, are bound by a common contract by the supreme representative of the order, which manages a trust fund for the benefit of the entire membership, if a court at the domicile of the association appoints to it a receiver, on account of its insolvency, it is competent for a court in another jurisdiction to order trust funds forming a part of the trust funds held by a local branch to be paid into the hands of the receiver.—DURWARD v. JEWETT, La., 15 South. Rep. 386.

96. RECEIVERS—Judgment after Discharge.—After discharge of a receiver appointed by a Federal Court, judgment cannot be rendered against him, the "Receiver's Act" of 1889, which authorizes judgment against receivers after their discharge in actions pending at the time, not applying to receivers appointed by Federal Courts.—FORDYCE v. DU BOSE, Tex., 26 S. W. Rep. 1050.

97. REMOVAL OF CAUSES—Action under United States Laws.—A suit to compel the receiver of a national bank to pay to complainant certain assets of the bank in his hands is one arising under the laws of the United States, within the meaning of the acts of March 3, 1887, and August 13, 1888, in regard to the jurisdiction of the Federal Courts.—HOT SPRINGS INDEPENDENT SCHOOL DIST. NO. 10, OF FALL RIVER COUNTY v. FIRST NAT. BANK OF HOT SPRINGS, U. S. C. C. (S. Dak.), 61 Fed. Rep. 417.

98. SALE—Contract—Pleading.—Where, in an action by a purchaser against the seller of goods for failure to deliver them, plaintiff declares on a written instrument, as the contract of sale, he is not entitled to recover on proof that the instrument was made and delivered to him as a memorandum of an oral bargain which it does not correctly state.—KING v. FAIST, Mass., 37 N. E. Rep. 456.

99. SALE FOR STREET ASSESSMENT.—The statute making a tax deed *prima facie* evidence of the proceedings requisite to its validity (Pol. Code, § 3786), is not inoperative because contained in the Political Code instead of the Code of Civil Procedure, which regulates the character and effect of evidence.—CLARKE v. MEAD, Cal., 36 Pac. Rep. 862.

100. SLANDER—Absolute and Conditional Privilege.—A committee of aldermen investigating charges against the board of public works, in order to report to the board of aldermen, having power by its president to subpœna and swear witnesses, but not to issue *capias* for them, nor commit them for refusal to testify, has no judicial character nor function, and the privilege of its witnesses is not absolute.—BLAKESLEE v. CARROLL, Conn., 29 Atl. Rep. 473.

101. SLANDER—Evidence.—In an action for slander in charging plaintiff with adultery, evidence that is was currently reported in the neighborhood that her husband was not the father of her children is inadmissible.—GRAY v. ELLZROTH, Ind., 37 N. E. Rep. 551.

102. TAXATION—Assets of Insolvent, in Hands of Assignee. — Personal property, whether in the form of moneys, bills receivable, bonds, certificates of stock, or otherwise, held by an assignee of an insolvent debtor, whose estate is being settled in the Probate Court, is not subject to taxation; and it is not the duty of such assignee to make return of the assets of such estate to the county auditor for taxation.—MCNEILL v. HAGERTY, Ohio, 37 N. E. Rep. 526.

103. TAXATION—Illegal Taxes—Recover.—A suit cannot be maintained by one tax-payer on behalf of himself and others, to recover back taxes alleged to have been illegally assessed, on the ground that the taxes were involuntarily paid by each. In such case each must bring the action on his own behalf. — TRUSTEES OF JACKSON TP. v. THOMAN, Ohio, 37 N. E. Rep. 523.

104. TAXATION—Market Value of Corporate Stock.—A tax upon the property of a telegraph company ("Nicholl's Law," Rev. St. Ohio, § 2778a), determined, in part at least, by the aggregate value of the shares of its capital stock, conflicts with a constitutional provision (Const. Ohio, art. 12, § 2), that the taxation of all taxable property shall be "by a uniform rule," because the market value of such stock bears no necessary relation or proportion to the value of the tangible property of the corporation, and because it involves elements of value, such as the good-will and earning capacity of the business, which are not taxable in the State, and not used therein to determine the value of the taxable property of individuals or other corporations. — WESTERN UNION TEL. CO. v. POE, U. S. C. C. (Ohio), 61 Fed. Rep. 449.

105. TRADE MARK — Validity. — "Bromo-Caffeine," a term not in general use when plaintiff applied it, and not descriptive of the articles used to make the medicine designated by it, is a valid trade-mark.—KEASBEY v. BROOKLYN CHEMICAL WORKS, N. Y., 37 N. E. Rep. 476.

106. TRESPASS TO TRY TITLE — Title.—Proof of title in some one else before the common grantor conveyed does not show that said grantor had no title when he conveyed, and defeat plaintiff's claim to the better title from said grantor.—RICE v. ST. LOUIS, A. & T. RY. CO., Tex., 26 S. W. Rep. 1047.

107. WARRANTY—Eviction—Judgment. — In an action for breach of warranty on the ground of eviction, a judgment in an action against plaintiff for the recovery of a part of the land does not warrant a recovery where such judgment was agreed to by plaintiff without defendant's consent. — MAVERICK v. ROUTH, Tex., 26 S. W. Rep. 1008.

108. WILL—Death of Legatee—Substitution.—Where a devisee dies before the testator, the testator's issue take the estate, not as heirs of the devisee, but as legatees under the will, under Gen. St. ch. 113, § 18, providing that in such case the issue surviving the testator take the estate devised as the devisee would have done if he survived the testator.—THOMPSON v. MYERS, Ky., 26 S. W. Rep. 1014.

109. WILLS — Jurisdiction of Federal Courts. — The proceeding under the laws of Oregon to contest the validity of a will which has been already admitted to probate, being a suit between parties, is one of which the United States Circuit Court may take jurisdiction, where the amount in controversy is sufficient, and the parties are citizens of different States. — RICHARDSON v. GREEN, U. S. C. C. of App., 61 Fed. Rep. 423.

110. WILLS—Revocation by Marriage. — The plaintiff and her sister agreed to make mutual wills, so that the survivor would get the whole estate, which was done accordingly. The sister subsequently married, and died without issue, in the belief that her will was valid. The plaintiff allowed her will to stand in full force as originally written: Held, that under section 2517, Code Va. 1887, the sister's will was revoked by her marriage, regardless of her wishes or intention in the matter.—HALE v. HALE, Va., 19 S. E. Rep. 789.

111. WILLS—Vested Estate. — Testator devised property to his wife for life, remainder to his three children equally, "and in case of the death of my sons, A and C, or either of them, without issue living at the time of his decease, then the share of the son so dying without issue shall be divided equally between my grandchildren, H and P:" Held, that such provision referred to the death of the sons during testator's life-time, and that they were entitled to a vested estate if they survived testator. — STOKES v. WESTON, N. Y., 37 N. E. Rep. 515.

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.
Published by
Central Law Journal Company,
919 OLIVE ST., ST. LOUIS, MO.

To whom all communication should be addressed.

Subscription price, FIVE DOLLARS per annum, in advance. Single numbers, TWENTY-FIVE CENTS.

Entered at the post-office, St. Louis, Mo., as second-class matter.

CONTENTS.